Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD D. SCHENCK,

Petitioner,

vs.

COMMISSION ON JUDICIAL FITNESS AND DISABILITY,
STATE OF OREGON,

Respondent.

Petition for a Writ of Certiorari to the
Supreme Court of the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

LEONARD GROSS
2600 Kent Drive
Carbondale, Illinois 62901
Telephone: (618) 453-8770

Attorney for Petitioner

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

I. Whether the discipline of a judge for his harsh criticism in the local newspaper of the performance in office of the District Attorney violates the First Amendment?

II. Whether Canons 1A, 2A and 3A (6) are unconstitutionally vague as applied to a judge's newspaper criticism of the performance in office of the District Attorney?

PARTIES

Judge Ronald D. Schenck

Commission on Judicial Fitness and Disability of the State of Oregon

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PETITION FOR A WRIT OF CERTIORARI

Ronald D. Schenck, Petitioner, hereby petitions the Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Oregon entered on March 10, 1994, rehearing and reconsideration of which was denied on April 28, 1994.

OPINIONS DELIVERED BELOW

In *In re* Complaint as to the Conduct of The Honorable Ronald D. Schenck, the Oregon Supreme Court disciplined Petitioner. Copies of the judgment and the opinion are reproduced in Appendix C commencing at page A-11.

A copy of the Findings of Fact, Conclusions of Law and Recommendation before the Commission on Judicial Fitness and Disability of the State of Oregon is reproduced in Appendix D commencing at page A-80.

JURISDICTIONAL STATEMENT

The decision of the Oregon Supreme Court sought to be reviewed was entered on March 10, 1994. On April 28, 1994, the Petitioner's petition for rehearing was denied. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Oregon Code of Judicial Conduct

Canon 1A:

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

Canon 2A:

"A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 3A (6):

"A judge should abstain from public comment about pending or impending proceedings in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official

duties or from explaining for public information the procedures of the court."

Constitution of the United States, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States, Amendment XIV, Section 1 provides in pertinent part:

"nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

(a) Course of the Proceedings Below

On October 20, 1992, the Commission on Judicial Fitness and Disability of the State of Oregon filed an amended complaint against Judge Ronald D. Schenck ("Petitioner") charging him with having violated Canons 1A, 2A and 3A(6) of the Oregon Code of Judicial Conduct for having written a Letter to the Editor and a Guest Editorial in the *Wallowa County Chieftain* in which he criticized the performance of the District Attorney (reprinted at Appendices A and B at A-1 and A-7). Petitioner was also charged with having committed several other violations of the Oregon Code of Judicial Conduct which are not relevant to this matter and for which Petitioner does not seek review in this Court.

On April 29, 1993, the Commission on Judicial Fitness and Disability of the Oregon Supreme Court issued "Findings of Fact, Conclusions of Law and Recommendation" (Appendix D at A-80). They found, inter alia, that Petitioner had violated

Canons 1A, 2A and 3A (6) of the Oregon Code of Judicial Conduct by his criticism of the District Attorney. They recommended that Petitioner be suspended for 90 days.

On March 10, 1994, the Oregon Supreme Court issued an opinion in which it determined that Petitioner had violated Canons 1A, 2A and 3A (6) of the Oregon Code of Judicial Conduct by his having written the Letter to the Editor and Guest Editorial critical of the District Attorney (Appendix C at A-13). (On matters unrelated to that on which Petitioner is seeking review, the Oregon Supreme Court agreed with certain determinations of the Commission on Judicial Fitness and Disability that Petitioner had violated the Code of Judicial Conduct and disagreed as to others.) The Oregon Supreme Court suspended Petitioner for 45 days without pay.

Petitioner filed a motion for rehearing and reconsideration with the Oregon Supreme Court. On April 28, 1994, the Oregon Supreme Court denied that motion (a copy of that decision is reproduced in Appendix E at A-119).

(b) Statement of the Facts

In June, 1992, Mary Goebel, the Wallowa County District Attorney, moved to disqualify Petitioner from hearing *State v. Vaughn*, a sex abuse case. *See* "Findings of Fact, Conclusions of Law and Recommendation" (hereinafter "Findings") at ¶ 19 (Appendix D at A-88). Petitioner challenged the motion under ORS 14.210 *et seq.*, but a visiting judge disqualified him nevertheless.

The disqualification was well-publicized in the local media. An article entitled "Schenck disqualified from abuse case" appeared in the *Wallowa County Chieftain*, on page one, "above the fold." The article suggested that the motion to disqualify was based on a disagreement between Goebel and Petitioner over the conditions for releasing Vaughn from custody before trial. It

also noted that Petitioner had "allow[ed] a convicted sex offender, Leonard Lewis of Joseph, to go free despite refusing to complete a sex offenders program."

Petitioner responded by writing a lengthy Letter to the Editor of the *Chieftain*, which was published on September 17, 1992, under the title "Judge Ron Schenck explains, defends position," *See* Findings at ¶ 47, at A-101. (A full copy of the letter is reprinted in Appendix A at A-1). The first 31 paragraphs of the 33-paragraph letter sought to dispel the impression that Petitioner is "in some way sympathetic to child molesters." In those paragraphs, Petitioner discussed at length the difficulties of sex abuse cases — not only for the prosection and defense, but also for the judge. The letter also discussed a criteria for pre-trial release of the defendant in such a case. It did not mention any particular case until the penultimate paragraph:

> The conditions I set in the Vaughn case were tough and reasonable. All Ms. Grote [sic] had to was say [sic] she demanded even tougher conditions and place the blame on me. Unfortunately her immaturity led her to view herself as the knight on the white charger and to set herself up as all knowing and righteous in her own position. Therefore, I am the devil to be avoided at all costs.
>
> If Ms. Grote [sic] maintains her position, the county will not have the services of the Circuit Judge elected by the voters of this county to hear felony criminal cases. Instead, Eric Valentine or a visiting judge will handle the Circuit Court criminal jurisdiction and the county will be served by a district attorney who has demonstrated a total lack of present ability, experience and maturity to handle the job of District Attorney. I will expand on the latter with specifics in another report.

Appendix at A-5 - A-6.

The "report" Petitioner promised at the end of his letter to the editor took the form of a Guest Editorial entitled "A judge's evaluation of the district attorney," published by the *Chieftain* on October 1, 1992. *See* Findings at ¶ 48, at A-102. In the editorial, Petitioner opines that Goebel is not a competent trial attorney:

> Since we both took office at the same time, I have worked with Ms. Goebel during the entire period of her performance in office.
>
> She has not won one felony jury trial.
>
> She does not yet have a grasp of how to present a witness.
>
> She does not yet have the ability to differentiate between what evidence should be presented in the State's case in chief as opposed to rebuttal.
>
> She does not understand the purpose of expert testimony in sex abuse cases or how to lay a proper foundation to get it admitted.

Appendix B at A-7.

Petitioner goes on to observe that Goebel does not know how to draft an indictment or judgment or to prepare a case for trial and that she is "consistently late to court." Appendix B at A-8.

Goebel's problems, Petitioner wrote, are the result of inexperience. She was admitted to the bar in 1990 and became DA the following year. According to Petitioner, "[p]utting an attorney right out of law school into the courtroom trying felony jury cases is like putting a medical student fresh out of medical school into the operating room to do complex surgery." Appendix B at A-9.

Petitioner made clear that the editorial was motivated by concern for the public interest:

> The real problem I face with Ms. Goebel representing the State is how do I insure [sic] that the State gets a fair trial? How do I insure [sic] that the people of Wallowa County have their case against a criminal defendant properly and competently represented — when it is obvious that the people's prosecutor does not have a clue as to how to proceed?

Id.

Neither the District Attorney nor the Oregon Commission on Judicial Fitness and Disability nor the Oregon Supreme Court has challenged the truth of Petitioner's statements.

REASONS FOR GRANTING THE WRIT

This Court should grant review in this case because it has never before had occasion to apply the test articulated in *Pickering* and *Connick* to publicly elected officials in general or to judges in particular. There are unique interests served by judicial speech and interests which this Court has not had occasion to address. In particular, the State of Oregon seeks to effectively censor judicial speech through a blanket claim that virtually any speech other than an explanation of court procedures will violate the Oregon Code of Judicial Conduct by undermining public confidence in the judiciary. We submit that it is vital that this Court send a message that a judge is not barred from publicly criticizing a popularly elected district attorney whose performance the judge has had a unique opportunity to observe and evaluate. Otherwise, voters will be deprived of a vital source of information about the qualifications of those whom they choose to administer the criminal justice system.

ARGUMENT

I. DISCIPLINE OF PETITIONER FOR A LETTER TO THE EDITOR AND A GUEST EDITORIAL CRITICAL OF THE PERFORMANCE OF THE DISTRICT ATTORNEY IS INCONSISTENT WITH THE FIRST AMENDMENT

As this Court has made clear on several occasions, public employees do not, by virtue of their position, forfeit their right of free speech under the First Amendment. Rather this court has recognized that public employees may possess valuable information of concern to the public. Allowing states to completely censor those views would be a disservice to the public. For those reasons, this Court has held that when public employee statements involve "matters of public concern," the Court must balance the strength of the interest served by the speech, including both the interest of the employee in making the speech and

the public in receiving it against the government's interest in promoting the efficient performance of the public service through the employee. *Waters v. Churchill*, 62 U.S.L.W. 4397, 4399 (May 31, 1994); *Connick v. Myers*, 461 U.S. 138, 150, 151-53, 103 S. Ct. 1684, 1691-92, 75 L. Ed. 2d 708 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968). If the speech involves a matter of public concern, the employee can be disciplined only if the speech caused more harm to the governmental agency's institutional efficiency than the benefit derived from the employee's speech. *Connick v. Myers*, 461 U.S. at 151-53, 103 S. Ct. at 1692-93, 75 L. Ed. 2d 708 (1983).

As we will show, Petitioner's criticism of the District Attorney clearly involved matters of public concern. Furthermore, Petitioner has a strong interest in being able to voice these views and the public has an even stronger interest in hearing them. The District Attorney is an elected official and her performance in office is a matter of great importance to the citizens of the county. The Petitioner, as someone who sees her performance on a routine basis, is ideally situated to evaluate her performance. In fact, virtually no one else is in a position to call attention to the District Attorney's alleged shortcomings in the performance of her duties. Although the government has an important interest in assuring that the judiciary is perceived as impartial and in maintaining public confidence in the performance of the judiciary, disciplining petitioner for his criticism of the District Attorney does not advance those interests. *See Waters v. Churchill*, 62 U.S.L.W. 4397, 4401 (May 31, 1994). In fact, public confidence in the functioning of the criminal justice system is undermined if the public believes that judges — the people in the best position to comment — are precluded from criticizing the performance of popularly elected district attorneys.

A. PETITIONER'S CRITICISM OF THE DISTRICT ATTORNEY WAS A MATTER OF PUBLIC CONCERN

Petitioner's criticism of the District Attorney in both his Letter to the Editor and in the Guest Editorial in the *Wallowa County Chieftain* clearly involved matters of public concern. For example, Petitioner criticized the District Attorney for her inability to present witnesses, for her inability to lay a proper foundation for expert testimony and for her repeatedly arriving late for court. He also stated that she lacked the necessary training or experience for the job. As the District Attorney is popularly elected and is subject to recall and re-election, the voters have a strong and continuing interest in securing information about her performance in office. They have a strong interest in making sure that the office is filled by a competent trial attorney. Petitioner's comments about the District Attorney were directly addressed to that question.

Petitioner is uniquely situated to observe and comment on the District Attorney's performance in office. Furthermore, no one else can fulfill that function as effectively as can the judge who observes her performance on an almost daily basis.

As an elected official himself, it is also a matter of public concern how the public perceives Petitioner's conduct in office. Just as with the District Attorney, the public has a vital interest in being able to evaluate Petitioner's performance in office. Thus, the Letter to the Editor and the Guest Editorial provide important information to the public about how the judge operates within the criminal justice system.

Petitioner's criticism, although at times harsh and even condescending (reference to the District Attorney as a "lovely young lady") did not cease to involve matters of public concern. As this Court explained in *Rankin v. McPherson*, "[t]he inappropriate or controversial character of a statement is irrelevant to the question

whether it deals with a matter of public concern." 483 U.S. 378, 387, 107 S. Ct. 2891, 2898, 97 L. Ed. 2d 315 (1987). In *Rankin*, in the context of criticizing the President's welfare policies, a clerical worker in the county constable's office said, after hearing of an assassination attempt on the President: "I hope if they go after him again, they get him." Petitioner's criticism of the District Attorney was certainly much less harsh than the statement made by the clerical worker in *Rankin*.

Even the Oregon Supreme Court found Petitioner's statements to involve matters of public concern. (Appendix C at A-48). The only real question is whether the State's interest in censoring the judge's speech outweighs the First Amendment right of the judge and the public.

B. PUBLIC CONFIDENCE IN THE JUDICIARY IS UNDERMINED BY DISCIPLINING PETITIONER FOR HIS PUBLIC CRITICISM OF THE DISTRICT ATTORNEY

The Oregon Supreme Court found that Petitioner violated Canons 1A, 2A and 3A (6) by his Letter to the Editor and his Guest Editorial in the local newspaper criticizing the performance in office of the District Attorney. All three of these Canons have as their premise the maintenance of public confidence in the judiciary. The Oregon Commission on Judicial Fitness and Disability believes that it is necessary to censor Petitioner's views on the District Attorney in order to preserve public confidence in the judiciary. To the contrary, however, censuring Petitioner for the remarks he made will actually undermine public confidence in the judiciary.

As the Fifth Circuit explained in *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990), judges are not like ordinary public employees, such as the teacher in *Pickering* or the assistant district attorney in *Connick*, who need to get along with their superiors or co-workers. *Id.* at 211. Petitioner was not hired by a

government employer. Instead, he was elected by the people to be a circuit court judge. In that capacity, he was expected to exercise independent judgment in cases brought before him and to be able to speak out on matters in which he perceived serious defects in the administration of justice in his county. *See Flowers*, 910 F.2d at 211-12. Such was the reasoning of the Fifth Circuit in reversing the discipline of Judge Scott. There, the State had not demonstrated that judicial independence would be undermined by Judge Scott's comments. So here, this Court should find that Petitioner's speech is constitutionally protected because the Oregon Commission on Judicial Fitness and Disability has not made a substantial showing as to how public confidence in the criminal justice system and judicial independence would be undermined by Petitioner's speech. *See Waters v. Churchill*, 62 U.S.L.W. at 4401; *Rankin v. McPherson*, 483 U.S. at 388-89, 107 S. Ct. at 2899.

C. DISCIPLINING PETITIONER FOR VIOLATING CANON 3A (6) ABRIDGED PETITIONER'S FIRST AMENDMENT RIGHTS AS THE COMMENTS DO NOT UNDERMINE PUBLIC CONFIDENCE IN THE JUDICIARY AND DO NOT IMPAIR THE RIGHT TO A FAIR TRIAL

The Oregon Supreme Court states that Petitioner can be disciplined for violating Canon 3A (6) (making statements concerning pending or impending matters) even if there is no direct comment on the merits of the proceeding and even if there is no "intent to affect the outcome or to impair the fairness of a particular case." We submit that, in the context of this case, that is an overly broad reading of the Rule and causes it to conflict with the First Amendment. The only comment that Petitioner made in his Letter to the Editor which even alluded to a pending matter was as follows:

> The conditions I set in the Vaughan case were tough and reasonable. All Ms. Grote [sic] had to was say [sic] she

> demanded even tougher conditions and place the blame on me. Unfortunately her immaturity led her to view herself as the knight on the white charger and to set herself up as all knowing and righteous in her own position. Therefore, I am the devil to be avoided at all costs.
>
> If Ms. Grote [sic] maintains her position, the county will not have the services of the Circuit Judge elected by the voters of this county to hear felony criminal cases. Instead, Eric Valentine or a visiting judge will handle the Circuit Court criminal jurisdiction and the county will be served by a district attorney who has demonstrated a total lack of present ability, experience and maturity to handle the job of the District Attorney. I will expand on the latter with specifics in another report.

Appendix A at A-5 - A-6.

At the time he wrote the Letter to the Editor, the *Vaughn* case was pending (though Petitioner had already been disqualified from hearing the case for other reasons). Petitioner made no comment on the merits of the case. He merely used the *Vaughn* case as a vehicle to explain his criticism of the District Attorney. (In his follow-up Guest Editorial, he explained in greater detail his criticism of the District Attorney but made no mention of pending cases.)

This court made clear in *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 111 S. Ct. 2720 (1991), that the purpose of restrictions on attorney speech is to insure that defendants receive a fair trial. Unless there is a substantial likelihood that speech will imperil a defendant's right to a fair trial, the restrictions are unconstitutional. Likewise, in *In re Sawyer*, 360 U.S. 622, 79 S. Ct. 1376 (1959), this court reversed the discipline of an attorney for his out-of-court criticism of a judge because the remarks did not impair the presiding judge's impartiality and fairness in conducting the trial. *See also In re Miera*, 426 N.W.2d 850, 857 (Minn.

1988), in which the court construed Canon 3A (6) narrowly, in part because of First Amendment considerations. Similarly, Petitioner should not be disciplined for speech that has no bearing on the merits of the matter and does not affect defendant's right to a fair trial or undermine public confidence in the judiciary. It is not even clear from the Oregon Supreme Court decision or the decision of the Oregon Commission on Judicial Fitness and Disability how this statement would undermine public confidence in the judiciary. Petitioner did not indicate how he believed the *Vaughn* case should be decided. All he did was use the *Vaughn* case as a basis for his criticism of the District Attorney, upon which he elaborated in his Guest Editorial.

Petitioner was also found by the Oregon Supreme Court to have violated Canon 3A (6) by his public comments on impending cases. Specifically, the court concluded that since the District Attorney was sure to be trying future cases before Petitioner, his comments critical of the District Attorney violated Canon 3A (6). Once again, Petitioner's comments will not undermine public confidence in his impartiality. Indeed, in numerous federal court cases (decided under 28 U.S.C. §455, which is substantially identical to Canon 3C of the Oregon Code of Judicial Conduct)[1], judges who have sharply criticized attorneys have not been disqualified because the courts have concluded that there is no reason for the public to think that the judge

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[1] Petitioner was not disqualified from the *Vaughn* case because of his public comments concerning the District Attorney but for other reasons. With respect to impending or future cases, there is no reason to believe that Oregon's Code of Judicial Conduct would require the Petitioner's disqualification from cases that involved the District Attorney any more than would 28 U.S.C. §455. Indeed the pertinent provisions are substantively identical. Canon 3C provides in pertinent part as follows:

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where

(Footnote 1 continued on next page)

would not be impartial. In *In re Lieb*, 112 B.R. 830, 834 (Bankr. W.D. Tex. 1990), the court held that the allegations that it had accused counsel of improper litigation tactics were, as a matter of law, insufficient grounds for recusal. In the course of the opinion, the court quoted the Court of Appeals in *In re Cooper*, 821 F.2d 833, 841 (1st Cir. 1987): "A court's disagreement—even one strongly stated—with COUNSEL over the propriety of trial tactics does not reflect an attitude of personal bias against the *client*. As Judge Barliant stated in *In re Forty-eight Insulations, Inc.*, 84 B.R. 129 (Bankr. N.D. Ill. 1988):

> even if an observer might have reason to believe that I have a low opinion of the professional abilities of the members of the Nachman firm, that is not reason to believe that I might not be impartial in this case. A judge need not have the highest opinion of the professional abilities of counsel to be fair to the parties. Otherwise, many judges would be forced to recuse themselves in many cases.

In this case, Petitioner made clear in his Guest Editorial that his real problem was how to insure that the State gets a fair trial

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(Footnote 1 continued)

> (a) the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;. . . .

28 U.S.C. §455 provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

Although Oregon may seek to hold judges to a higher standard than federal court judges are held to, it may not do so if the result is to abridge judges' First Amendment rights.

in light of the District Attorney's inexperience. He concluded that, "[t]he judge's hands are tied for the most part. The judge must maintain impartiality, especially in criminal trials and cannot help either side present their case." Appendix B at A-9. It is hard to see how the Petitioner's criticism of the District Attorney would have had any impact on the rights of parties or have had any but a positive effect on the public's perception of the independence of the judiciary. Furthermore, when the remarks are read in context, it is clear that Petitioner is saying that there is nothing he can do to protect the State from the District Attorney's inexperience. "His hands are tied." In sum, a reasonable person familiar with all the facts would not conclude that Petitioner's remarks would make him appear less than impartial. *Compare Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-60, 108 S. Ct. 2194, 2202-03, 100 L. Ed. 2d 855 (1988).

The Oregon Supreme Court concluded that the "manner, time and place in which the Judge raised these issues makes his discipline constitutional." The restriction in question is not a valid time, place and manner restriction since it is not content neutral. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-64, 96 S. Ct. 2440, 2448-49, 49 L. Ed. 2d 310 (1976). Moreover, under the Oregon Judicial Commission's view, Petitioner would be precluded from ever criticizing the District Attorney until such time as either he or she left office. Such a view of time, place and manner restrictions amounts to an indefinite censorship and would have the effect of making any criticism worthless. By construing Canon 3A (6) so broadly, the Oregon Supreme Court has, in effect, determined that members of the public can never hear the judge's criticism of the District Attorney at any time when it might be useful to them in deciding how to vote in future District Attorney elections or recalls or even in future judicial elections. Disciplining a judge for out-of-court speech raises much more serious problems than disciplining a judge for in-court speech because the public may forever be

deprived of the benefit of the judge's observations. *See* Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 Syracuse L. Rev. 1181, 1227 (1985).

II. CANONS 1A, 2A AND 3A (6) ARE UNCONSTITUTIONALLY VAGUE AS APPLIED TO PETITIONER'S CRITICISM IN THE LOCAL NEWSPAPER OF THE DISTRICT ATTORNEY'S PERFORMANCE IN OFFICE

In order not to be unconstitutionally vague, a rule must give "fair notice to those to whom [it] is directed. *Grayned v. City of Rockford*, 408 U.S. 104, 112 , 92 S. Ct. 2294, 2301, 33 L. Ed. 2d 222 (1972). In *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 111 S. Ct. 2720 (1991), this Court held that a Nevada Supreme Court Rule prohibiting lawyers from making extrajudicial statements to the press was void for vagueness because lawyers could only guess at the meaning of its safe harbor provision. Lawyers had no way to know when their statements might be outside the safe harbor permitting statements of a "general nature of the defense without elaboration."

In the instant case, Canons 1A, 2A and 3A (6) are unconstitutional as applied to Petitioner's speech. Petitioner had no way of knowing that his conduct would undermine the independence of the judiciary or public confidence in the independence of the judiciary. Indeed, for the reasons given earlier, his speech would likely enhance the public's view of the judiciary and its independence. In addition, Petitioner had no way of knowing that Canon 3A (6) would be applied to statements critical of the District Attorney which referred only to a case pending on appeal and which had no bearing on the merits. Indeed, it was his view that the Rule would not be interpreted that broadly, at least in part because such a broad interpretation would create serious problems of overbreadth. Similarly, he could not have imagined that "impending cases" would be interpreted so broadly that there

would never be a time when he could criticize the District Attorney without running afoul of the rule. In sum, Rules 1A, 2A and 3A (6) as applied raise serious problems of overbreadth and vagueness.

III. *MT. HEALTHY* DOES NOT PRECLUDE RELIEF FOR PETITIONER SINCE HE SEEKS ONLY TO HAVE HIS RECORD CLEARED FOR HIS CRITICISM OF THE DISTRICT ATTORNEY

In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), this Court held that a public employee who is discharged for engaging in constitutionally protected conduct is not entitled to any relief if the employer can prove that it would have taken the same action absent the conduct. Other federal courts have applied the *Mt. Healthy* rule to disciplinary cases not involving discharge. *See North Mississippi Communications, Inc. v. Jones*, 874 F.2d 1064 (5th Cir. 1989). The rule in *Mt. Healthy* should not prevent Petitioner from obtaining relief in this case. Petitioner was clearly disciplined, at least in part, for his criticism of the District Attorney. Moreover, it is irrelevant whether Petitioner would have received the same discipline (45 day suspension) with or without his comments criticizing the District Attorney. Just like the judge in *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990), Petitioner is seeking only to have his record cleared for his comments concerning the District Attorney. This Court has recognized the value of reputational interest. *Cf. Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515 (1971). The rule in *Mt. Healthy* was designed to insure that public employees who otherwise merit discharge or discipline are not spared because of their public speech. Ordering that the Oregon Supreme Court expunge the discipline of Petitioner for his public criticism of the District Attorney will not put him into a better position than he otherwise would have occupied.

CONCLUSION

This case involves a question of first impression in this Court on the free speech rights of judges to engage in public criticism of elected officials on matters in which they are uniquely situated to comment. This Court should grant the writ to determine the scope of judges' rights to speak on matters of public concern and the public's right to receive the benefit of that speech.

Respectfully submitted,

Leonard Gross
2600 Kent Drive
Carbondale, IL 62901
Telephone: (618) 453-8770

Attorney for Petitioner

APPENDIX

APPENDIX A

Wallowa County Chieftain
Letter to the Editor
Thursday, September 17, 1992

Judge Ron Schenck explains, defends position

I was more than a little disturbed by the article entitled 'Schenck disqualified from abuse case.'

The reporting of the disqualification was fine. The disturbing part was linking the reason for the disqualification with the Lewis case in Union County and completely misrepresenting the facts of the Lewis case and my actions in it.

This linking and misrepresentation gave the impression that I am in some way sympathetic to child molesters. Anyone who knows me even slightly, knows that is a completely and totally false impression.

For the past decade there has been more than a little hysteria connected with the handling by law enforcement and the courts of allegations of child sexual abuse.

I will not run a court that is driven by hysteria or political pressure of any kind in any type of case.

The use and abuse of a child in any manner for adult sexual gratification is abominable. Child sexual abuse or even just physical abuse almost universally raises in normal people strong passions and demands for severe consequence to the perpetrator.

In most of the cases, the perpetrator admits or there is strong evidence and guilt is fairly easily established.

However, there are those cases where allegations are made and for varying reasons, nothing is very clear.

Sometimes it is a proof problem where there are no eyewitnesses except the child victim and the perpetrator, and very little or no physical evidence — or the physical evidence is not clearly tied to the abuse — could be caused by some other trauma, physical or mental, etc.

Sometimes the motive of the person reporting is challenged, such as in child custody cases where one parent accuses the other, or where teenagers have a history of discipline problems with the parent and the child is accusing the parent.

There are also problems of time passing between the alleged abuse and the reporting, especially where very young children are the victims. Quite often they do not report until later in life. This raises memory and perception problems.

The methods and procedures used by those investigating the allegations are critical in cases where the child victim's testimony is critical — especially a very young child.

The investigative interview must be conducted without any hint of leading or suggestive questions or information being fed the child. Law enforcement and child protective personnel have, over the last decade, made significant strides in this area but more is being learned every day.

Children, like adults, sometimes misperceive and some are suggestible.

Once an allegation of child sex abuse is made, the consequences are devastating and irretrievable. Adults are destroyed; children are destroyed; whole families are destroyed.

Where there are significant problems with a child sex abuse case, it becomes a prosecutor's worst nightmare. If they prosecute and lose, they have not only not brought a perpetrator to justice and thereby accomplish some measure of protection of the victim and the public, but they have further traumatized the

victim and the victim's family and possibly destroyed the life of the alleged perpetrator.

If they do not prosecute, they stand to be vilified by the persons bringing the charge and by the media.

Courts do not have as difficult a job as prosecutors in those cases, but there is almost unanimous agreement amongst judges across the nation that contested child sex abuse cases are the most difficult cases which courts are called upon to handle — especially the pre-trial proceedings and sentencing. Usually a jury takes the burden of deciding guilty or not guilty.

The court is faced with the first difficult decision when release pending trial is an issue.

The law is clear that a defendant has the right to release pending trial (except in cases of murder where there is clear and convincing reason to believe the defendant is guilty) upon posting reasonable bail or on the defendant's own recognizance if there is no reason to believe that the defendant will fail to appear and answer to the charges.

The court may, on a bail release or an O.R. release, set reasonable conditions to assure the defendant's appearance.

The court cannot set conditions that are in fact, or in effect, punishment for the alleged crime. All defendants are under our constitution, presumed innocent until proven guilty.

If there are facts that lead the court to believe that the defendant presents a danger to the public or the victims, etc., the court can set conditions on the activities of the defendant pending trial.

In Oregon, the leading case is *Sexson v. Merten*, 291 Or 441, which held that a defendant accused of DUII who had a clear alcohol addiction problem and a record of convictions for

alcohol related offenses could be required, pending trial, to abstain from the use of alcohol and be required to report to a custody officer, etc.

So, in child sex abuse cases where there is a factual background to indicate that the defendant is a danger to his alleged victims or to other potential victims, the court can require that the defendant not contact directly or indirectly the victim or the victim's family or place himself in circumstances where the defendant might have opportunity to victimize other children.

This usually means that the defendant will be required to have some neutral, responsible adult around if children are present.

The conditions of release must be reasonable and based on facts. In most cases, other than child sex abuse cases, conditions are pretty standard and easily set. But in child sex abuse cases, the old paranoia and hysteria still enters. If the court tries to be reasonable and base a release decision on the facts of the particular case, accusations of being soft on child sex abusers are raised. Statistics are cited as to the probability that child sex abusers will re-offend; that abusers of females often also abuse males, etc., etc.

The problem is that the court is not dealing with a statistic, but with a human being who is entitled to the protection of the constitution and the law until proven guilty.

At this early stage, the court really knows very little about the evidence against the defendant.

The prosecutors want to absolve themselves of any blame if the defendant re-offends pending trial, so they often demand conditions they know are not proper, or at least are stretching the boundaries of the law. The prosecutor also has the benefit of being aware of all of the evidence.

The principle [*sic*] condition demanded is that the defendant not have a contact with children under age 18.

This includes attending church where children are present, going to school functions, or entering McDonalds, etc.

Applied to every case I do not believe this to be a proper condition, and it is almost impossible to administer.

Conditions are also demanded to prevent an accused parent from having any contact with one or more of their own children who they are not accused of abusing and who are not witnesses. This automatically totally splits up families — sometimes for years — before there is a trial.

These are difficult problems, not [*sic*] be avoided by a Pavlov's dog type response to every case — which is what some judges do to avoid making tough decisions and to avoid criticism. There should be no such thing as standard release conditions or release conditions based on a standard 'policy' in these cases.

All standard release conditions are established for is to protect the prosecutor and the judge from criticism. However, the prosecutor can always point at the judge and that is how it should be. The judge makes the decision and the buck stops with the judge.

The conditions I set in the Vaughan case were tough and reasonable. All Ms. Grote [*sic*] had to was say [*sic*] she demanded even tougher conditions and place the blame on me. Unfortunately her immaturity led her to view herself as the knight on the white charger and to set herself up as all knowing and righteous in her own position. Therefore, I am the devil to be avoided at all costs.

If Ms. Grote [*sic*] maintains her position, the county will not have the services of the Circuit Judge elected by the voters of this county to hear felony criminal cases. Instead, Eric Valentine or

a visiting judge will handle the Circuit Court criminal jurisdiction and the county will be served by a district attorney who had demonstrated a total lack of present ability, experience and maturity to handle the job of the District Attorney. I will expand on the latter with specifics in another report.

R. D. Schenck
Circuit Judge
District 10

APPENDIX B

Wallowa County Chieftain
Guest editorial
Thursday, October 1, 1992

A judge's evaluation of the district attorney

By Ronald D. Schenck

This is a report on my observations and evaluation of the performance of Mary Goebel as District Attorney for Wallowa County.

This is not something I would do in the ordinary course. However, Ms. Goebel's recent decision to disqualify me in every case she files leaves me with no alternative.

In my letter to you regarding the disqualification issue dated August 31, 1992, I stated that I would set forth specifics upon which I based my opinion that Ms. Goebel does not have the capability, experience or maturity to handle the duties of District Attorney. I do that now.

Since we both took office at the same time, I have worked with Ms. Goebel during the entire period of her performance in office.

She had not won one felony jury trial.

She still does not have a grasp of how to present a witness.

She does not as yet have the ability to differentiate between what evidence should be presented in the State's case in chief as opposed to rebuttal.

She does not understand the purpose of expert testimony in sex abuse cases or how to lay the proper foundation to get it admitted.

In one sex abuse case, she had to dismiss the case three times and take the indictment back to the grand jury the fourth time before she got it right. That case has been delayed for trial for over a year because she simply did not know how to get it prepared for trial.

She dismissed a felony sex abuse case based on an experienced defense attorney's assertion that the statute of limitation had ran [*sic*] out when in fact it had not.

The District Attorney always prepares the Sentence Order and Judgment. I have had to revise every sentence order she has presented to me. Some were seriously defective.

In two major felony cases, I have had to reject plea bargains which she agreed to. In both cases, she would have permitted the defendant to be sentenced to optional probation for serious felony crimes — one for dealing in controlled substances and having 90 pounds of marijuana in possession, and another for assault on his wife which almost killed her. I ended up sentencing both to maximum terms in state prison.

In the first nine months or so she was consistently late to court. I finally had to reprimand her in open court.

If you speak to her critically, even in a positive vein, she cries.

She has no comprehension of what a case (work) load is. She spoke to me about applying to the County for inclusion in her budget of money to hire a deputy to help her.

The fact of the matter is that she has a workload (caseload) which is not more than 20 percent and probably closer to 10 percent of the caseload carried by the attorneys in the District Attorney's office in La Grande. There are three attorneys in La Grande, and over 200 felony cases were filed in 1991. Ms. Goebel filed eight felony cases in Wallowa County in 1991. The same percentages would hold for District Court.

Ms. Goebel, straight out of law school is being paid around $50,000 per year with benefits above that of $10,000 per year.

She should be able to do the county's civil work for nothing and still have less than a 50 percent workload. She resigned from doing the civil work even though she was getting paid.

She accuses me of being biased against the State. The problem is really the opposite for me as judge. The real problem I face with Ms. Goebel representing the State is how do I insure [*sic*] that the State gets a fair trial? How do I insure [*sic*] that the people of Wallowa County have their case against the criminal defendant properly and competently presented — when it is obvious that the people's prosecutor often does not have a clue as to how to proceed?

The judge's hands are tied for the most part. The judge must maintain impartiality, especially in criminal trials and cannot help either side present their case.

I could go on, but I think you have the picture by now.

Putting an attorney right out of law school into the courtroom trying felony jury cases is like putting a medical student fresh out of medical school into the operating room to do complex surgery.

Unfortunately, Ms. Goebel is the sole attorney in the Wallowa County District Attorney's office. She had no one to guide her on a daily basis. Her case load is not sufficient for her to gain experience rapidly.

I spent several years going to court with an experienced attorney, as his assistant, before I tried a case.

Ms. Goebel is a lovely young lady. But she has placed herself in a position for which she has neither the training or experience to perform the duties competently.

Unfortunately, in this instance, it is the public that will get the short end of the stick. It may also be that Ms. Goebel will be seriously damaged in her career. She has a lot of potential if she was in a position where she could be properly trained.

The position of the District Attorney in Wallowa County has had its problems for as long as I can remember. No energetic, experienced, young career-minded attorney wants to take the job because it really offers little challenge and little opportunity for advancement. So the county has been saddled with older attorneys who were in fact not all that energetic or younger attorneys who were not all that experienced.

Perhaps the county court needs to investigate what alternatives might be available to ensure the county has a vigorous, competent prosecutor.

Editor's note: Ronald D. Schenck is the Circuit Court judge for Union and Wallowa counties.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OREGON

Filed: March 10, 1994

In re Complaint
as to the Conduct of

THE HONORABLE RONALD D. SCHENCK,

Accused.

(JFC 91-119; SC S40197)

Review of the Findings of Fact, Conclusions of Law and Recommendation of the Commission on Judicial Fitness and Disability of the State of Oregon.

Argued and submitted November 3, 1993.

Ronald D. Schenck, La Grande, *in pro per*, argued the cause and filed the briefs.

Ronald L. Marceau, Bend, argued the cause and filed the brief on behalf of the Commission on Judicial Fitness and Disability.

Thomas M. Christ, Portland, filed a brief *amicus curiae* on behalf of the ACLU Foundation of Oregon, Inc.

Before Gillette, Presiding Justice, Van Hoomissen and Unis, Justices, and Richardson and Warren, Justices *pro tempore*.

PER CURIAM

The accused is suspended from office without pay for a period of 45 days, commencing on the effective date of this decision.

Unis, J., specially concurred in part and dissented in part and filed an opinion.

APPELLATE JUDGMENT

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party:

[X] No costs allowed

Appellate Judgment
Effective Date: May 16, 1994

SUPREME COURT
(seal)

IN THE SUPREME COURT OF THE STATE OF OREGON

Filed: March 10, 1994

In re Complaint
as to the Conduct of

THE HONORABLE RONALD D. SCHENCK,

Accused.

(JFC 91-119; SC S40197)

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PER CURIAM

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Unis, J., specially concurred in part and dissented in part and filed an opinion.

PER CURIAM

This judicial discipline case is before the court on mandatory direct and *de novo* review of the Findings of Fact, Conclusions of Law and Recommendation of the Commission on Judicial Fitness and Disability (Commission).[1] The Commission issued a complaint and notice of institution of formal proceedings against Ronald D. Schenck, a judge of the circuit court of the State of Oregon for Union and Wallowa Counties (the Judge), alleging that he had violated several canons of the Oregon Code of Judicial Conduct (the Code). After a hearing, the Commission found that the Judge had violated certain canons in several respects, and recommended that he be suspended from office without pay for three months.

The Commission concluded that the Judge had wilfully violated Canons 1, 2A, and 3C(1) when he refused to disqualify himself in cases in which his impartiality might reasonably be questioned, that the Judge had wilfully violated Canons 1, 2A, and 3A(4) when he initiated *ex parte* communications concerning pending or impending cases, and that the Judge had wilfully violated Canons 1, 2A, and 3A(6) when he made public comments in a letter to the editor and in a guest editorial about pending or impending cases and about the District Attorney of Wallowa County.[2] After discussing the law that applies generally to each canon that the Commission concluded the Judge had

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[1] The Commission has jurisdiction in this proceeding pursuant to ORS 1.410 *et seq* and Article VII (Amended), section 8(1), of the Oregon Constitution. The Supreme Court may censure, suspend, or remove the judge from office. Or Const, Art VII (Amended), § 8(1); ORS 1.430(1). The Commission has no independent authority to discipline a judge. *See In re Fadeley*, 310 Or 548, 553-55, 802 P2d 31 (1990) (history of the Commission and the Oregon Code of Judicial Conduct).

[2] The full texts of the Judge's letter to the editor and guest editorial are found in the appendix to this opinion.

violated, we will consider each of the Commission's conclusions in turn.[3]

STANDARDS FOR REVIEW AND DISCIPLINE

Article VII (Amended), section 8(1)(e), of the Oregon Constitution, provides in part:

> "(1) In the manner provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court or censured by the Supreme Court, for:
>
> "* * * * *
>
> "(e) Wilful violation of any rule of judicial conduct as shall be established by the Supreme Court * * *[.]"

Consistent with this constitutional recognition of its authority, the Supreme Court has adopted the Code. *See In re Fadeley*, 310 Or 548, 560-61, 802 P2d 31 (1990) (holding that the constitutional provision carried with it the acknowledgment of preexisting rules regulating judicial conduct). The canons of the Code at issue in this case were in effect at all material times.

This court reviews *de novo* the Commission's findings, conclusions, and recommendation. ORS 1.430(1); *In the Matter of Field*, 281 Or 623, 627-28, 576 P2d 348 (1978). In order to conclude that there had been a wilful violation of a rule of judicial

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[3] The Commission also concluded that there was not clear and convincing evidence that Judge Schenck had wilfully violated the Code in several other respects charged in the complaint. Although this court reviews the entire record of the proceedings under ORS 1.420 on the law and facts and may receive additional evidence, ORS 1.430(1), in this case we will review only those causes of complaint against the Judge that resulted in a conclusion by the Commission that the Judge wilfully violated a canon of the Code. *See In re Gustafson*, 305 Or 655, 756 P2d 21 (1988) (reviewing only those causes of complaint for which the Commission had found a wilful violation).

conduct established by this court, we must find clear and convincing evidence of a wilful violation. *See In re Gustafson*, 305 Or 655, 668, 756 P2d 21 (1988) (applying that standard); *In the Matter of Field, supra*, 281 Or at 629 (same).

In *In re Gustafson, supra*, 305 Or at 660, this court held:

> "[A] judge's conduct is 'wilful' within the meaning of Article VII (Amended), section 8, if the judge intends to cause a result or take an action contrary to the applicable rule and if he is aware of circumstances that in fact make the rule applicable, whether or not the judge knows that he violates the rule."

The intent required is simply an intentional act, defined as an act done with "the conscious objective of causing the result or of acting in the manner defined in the rule of conduct." *Id.*

CANONS 1 AND 2A

Canon 1 provides:

> "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

Canon 2A provides:

> "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

With respect to each violation of Canon 3, the Commission found, without discussion, concomitant wilful violations of

Canons 1 and 2A. We conclude that the violations of Canon 1 stand or fall with the conclusions respecting the violations of Canon 3. The same also is true of the violations of Canon 2A, with the exception of the alleged violation of Canon 3A(6), where Canon 2A will be discussed separately below.

CANON 3C(1)

Canon 3C(1) provides:

> "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> "(a) the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> "(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously was associated served during such association as a lawyer concerning the matter or the judge or such lawyer has been a material witness concerning it;
>
> "(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or is a party to the proceeding, or have any other interest that could be substantially affected by the outcome of the proceeding;
>
> "(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> "(i) is a party to the proceeding, or an officer, director or trustee of a party;

"(ii) is acting as a lawyer in the proceeding;

"(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

"(iv) is, to the judge's knowledge, likely to be a material witness in the proceeding."

The general standard of conduct stated in the first clause of Canon 3C(1) expressly includes, but is not limited to, the four particular instances listed in Canon 3C(1)(a)-(d).

The purpose and importance of Canon 3C(1)'s admonition, *viz.*, "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned * * *," should be evident, because not only the fact but also the appearance of impartiality are the very currency of judicial legitimacy. *See In re Fadeley*, *supra*, 310 Or at 563 ("The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. A democratic society that, like ours, leaves many of its final decisions, both constitutional and otherwise, to its judiciary is totally dependent on the scrupulous integrity of that judiciary."); *see also* Code of Judicial Conduct, Canon 2A ("A judge should * * * act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct* vii, 15 & n 26 (2d ed 1992) (the appearance of impartiality is important to developing public confidence in the judiciary). Indeed, the rules of judicial conduct are fashioned, in part, for the purpose of maintaining public confidence in the legal system, by imposing a system of ethical restraints that will further both the fact and the appearance of a system committed to providing equal justice under law. Abramson, *supra*, at 1, 15.

With the foregoing principles in mind, we consider each of the four cases in which the Commission concluded that the Judge

had wilfully violated Canons 1, 2A, and 3C(1) when he refused to disqualify himself.

A. *The Hopkins juvenile case*

In 1989, Karen Hopkins pleaded guilty to charges of sodomy in the first degree and sexual abuse in the first degree, involving one of her two children. She was placed on probation with several special conditions. In August 1990, Children's Services Division (CSD) filed a dependency petition in juvenile court with respect to Hopkins' children. ORS 419.476(1)(d). Her children were placed in CSD's temporary custody. Periodic status reports filed by CSD stated that CSD's goal was to return the children to their parents.

The Judge took office as a circuit judge in January 1991. In April 1991, Hopkins was charged with violating a term of her criminal probation that required her to participate in a treatment program for sexual offenders. The Judge presided over that probation violation hearing. In September 1991, he issued a written opinion in which he concluded that Hopkins had not wilfully violated her probation. That opinion also stated:

> "The Court is convinced that insofar as her children are concerned, this young woman, will not, in the foreseeable future, be able to participate in their lives, or to have any relationship with them whatsoever.
>
> "* * * * *
>
> "CSD should move to develop a permanent plan for the placement of [Hopkins'] children, which does not include contact with [Hopkins]. Termination of parental rights should be pursued."

Between September 4, 1990, and October 24, 1991, no hearings were held, no petitions were filed, and the court made no rulings in the Hopkins juvenile case. The children remained in

CSD's custody subject to further order of the court. ORS 419.577(1)(e).

On October 25, 1991, Hopkins received notice that a juvenile court hearing was scheduled for November 6, 1991, before the Judge, for "adjudication and disposition" of her children's juvenile dependency case. That same day, through her lawyer, Bruce Anderson, Hopkins moved to disqualify the Judge pursuant to ORS 14.250 *et seq.*[4] In her affidavit, Hopkins stated in part:

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[4] ORS 14.250 provides in part:

> "No judge of a circuit court shall sit to hear or try any suit, action, matter or proceeding when it is established, as provided in ORS 14.250 to 14.270, that any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge. * * *"

ORS 14.260 provides in part:

> "(1) Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court may establish the belief described in ORS 14.250 by motion supported by affidavit that such party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge, and that it is made in good faith and not for the purpose of delay. No specific grounds for the belief need be alleged. Such motion shall be allowed unless the judge moved against, or the presiding judge in those counties where there is one, challenges the good faith of the affiant and sets forth the basis of such challenge. In the event of such challenge, a hearing shall be held before a disinterested judge. The burden of proof shall be on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.
>
> "(2) The affidavit shall be filed with such motion at any time prior to final determination of such cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after such cause, manner or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office of another judge to preside over such cause, matter or proceeding.

(Footnote 4 continued on next page)

> "I believe that my children and I cannot have a fair and impartial hearing before [the Judge] and request that he be disqualified from hearing or determining any issues or facts in this matter."

That same day, the Judge denied Hopkins' motion, writing "Denied not timely" on the motion.

On October 28, 1991, Anderson met with the Judge concerning the denial of Hopkins' disqualification motion. Anderson sent the judge a confirming letter the next day. In the meeting and in the letter, Anderson relied, not only on Hopkins' affidavit filed under ORS 14.260(1), but also on the ground that the Judge was *actually* biased toward Hopkins. Pointing specifically to the Judge's written opinion in Hopkins' probation revocation case, Anderson further asserted that the Judge's disqualification in the juvenile cases was required by Canon 3C(1) Anderson noted that the district attorney, who represented the Union County Juvenile Department in the Hopkins juvenile case, joined in the request that the Judge disqualify himself. The Judge refused to postpone the November 6 juvenile court hearing, telling Anderson that the hearing would be on the issue of the Judge's disqualification and that he would preside over the hearing.

(Footnote 4 continued)

> "(3) No motion to disqualify a judge shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding. No motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides shall be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment.
>
> "* * * * *
>
> "(5) No party or attorney shall be permitted to make more than two applications in any cause, matter or proceeding under this section."

The Judge did not challenge Hopkins' good faith or the sufficiency of her affidavit under ORS 14.260(1), nor had Hopkins made any prior motion to disqualify any judge in the juvenile case, ORS 14.260(5).

On October 29, 1991, Anderson filed a complaint with the Commission, alleging, *inter alia*, that the Judge had violated Canon 3C(1) when he refused to recuse himself in the Hopkins juvenile case. On October 30, 1991, the Judge and Anderson had a telephone conversation regarding the Hopkins juvenile case during which the Judge asked Anderson, "Who in the hell made you God's gift to the legal profession?"

On November 5, 1991, the presiding judge of the judicial district in which the Judge serves ordered that the scheduled November 6 hearing in the Hopkins juvenile case be postponed and that the issue of the Judge's disqualification in that case be submitted to another judge.[5] Notwithstanding the presiding judge's order, the Judge refused to postpone the November 6 hearing. He told the parties that they would be in contempt if they did not attend the hearing. On November 6, the Judge convened a hearing at which only a representative of CSD appeared. No action was taken, however, and the Judge continued the case until December 4, 1991.

On November 8, the Judge sent a letter to each member of the Union and Wallowa County Bar Associations, enclosing a copy of Anderson's complaint to the Commission, and characterizing the complaint as "pathetic" and "a petulant response."

On November 14, 1991, Anderson wrote to the Judge about the December 4 setting of the Hopkins juvenile case. In his letter, Anderson stated in part:

> "When I last attempted to discuss the Hopkins case with you on the morning of November 6th, you openly cursed me

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[5] *See generally* ORS 3.065 (presiding judge's role). The questions of the presiding judge's authority to postpone the hearing and whether the disqualification motion should have been heard by another judge were not resolved by this court in *State ex rel Hopkins v. Schenck*, 313 Or 529, 836 P2d 721 (1992) (discussed in text, *infra*).

> and my methods of practicing law. I suppose that is an understandable reaction to my October 29th filing of a Judicial Fitness Commission Complaint against you. * * * Under the circumstances, I believe it is even more appropriate now than on October 25th that you disqualify yourself from this matter."

On November 25, 1991, Hopkins petitioned this court for a writ of mandamus, seeking to require the Judge to vacate his October 25 order denying Hopkins' motion to disqualify him, as well as to require the Judge to recuse himself or set a hearing before another judge on the question whether the Judge should be disqualified in the juvenile case. The Union County District Attorney, representing the Union County Juvenile Department, joined in that petition. This court stayed the juvenile cases and issued an alternative writ of mandamus.

On July 9, 1992, this court issued an opinion directing that a peremptory writ of mandamus issue requiring the Judge to vacate his order denying Hopkins' motion to disqualify him, and to grant Hopkins' motion. This court held that Hopkins had timely filed her motion to disqualify the Judge and that, because the Judge had not challenged Hopkins' good faith in filing the motion, he had a duty to grant the motion pursuant to ORS 14.260(1). *State ex rel Hopkins v. Schenck*, 313 Or 529, 538-39, 836 P2d 721 (1992). *See also State ex rel Kafoury v. Jones*, 315 Or 201, 205, 843 P2d 932 (1992) (generally, a timely motion under ORS 14.260 must be granted, absent bad faith or purpose of delay). In this case, the Commission later concluded that the Judge wilfully violated Canon 3C(1) by not disqualifying himself in the Hopkins juvenile case before the peremptory writ of mandamus issued.

This court has held that there are two predicates for a "wilful violation" of a rule of judicial conduct established by this court, each of which is necessary for there to be a wilful violation: (1) that the judge must intend "to cause a result or take an action

contrary to the applicable rule" of judicial conduct, and (2) that the judge must be "aware of circumstances that in fact make the rule applicable, whether or not the judge knows that he violates the rule." *In re Gustafson, supra*, 305 Or at 660. In this case, we conclude that the Judge's error of law in denying Hopkins' October 25, 1991, disqualification motion on timeliness grounds does not, in and of itself, satisfy either predicate necessary to establish a wilful violation.

Hopkins' ORS 14.260 disqualification motion relied solely on her affidavit asserting Hopkins' statutorily-required belief that "my children and I cannot have a fair and impartial hearing before [the Judge] and request that he be disqualified from hearing or determining any issues or facts in this matter." No mention was made in the affidavit about the Judge's written opinion from the Hopkins' probation violation hearing. The Judge did not challenge Hopkins' good faith in filing the motion. ORS 14.260(1). On this record, we conclude that there is not clear and convincing evidence that, when he denied Hopkins' ORS 14.260 motion on timeliness grounds, the Judge was consciously aware of the specific underlying basis for the bare assertion made in Hopkins' affidavit. Consequently, there is insufficient proof that on October 25, 1991, the Judge was aware of circumstances that made Canon 3C(1) of the Code applicable in the Hopkins juvenile case.

Moreover, even assuming the erroneous denial of Hopkins' disqualification motion on timeliness grounds, without more, that is not an "action contrary to the applicable rule of judicial conduct." Canon 3C(1) admonishes judges to disqualify themselves in cases in which their impartiality reasonably might be questioned. Ordinarily, a judge may deny a basic statutory disqualification motion on the ground that it is untimely, pursuant to ORS 14.260 or 14.270, without thereby becoming subject to discipline under Canon 3C(1). The bare assertion in an affidavit of a belief that the party or lawyer cannot receive a fair

hearing before a judge, without more, is not a basis for a finding based on clear and convincing evidence that the judge is improperly going forward to adjudicate a case in which the judge's impartiality might reasonably be questioned. By the same token, a judge may errantly deny a basic statutory disqualification motion on timeliness grounds if the judge reasonably believes that the motion is untimely, without the erroneous legal conclusion on the issue of timeliness, by itself, implicating Canon 3C(1).

We conclude that there was nothing sanctionable in the Judge's behavior in denying Hopkins' October 25, 1991, ORS 14.260 motion on timeliness grounds.

On October 28-29, 1991, however, Anderson followed up Hopkins' original motion to disqualify the Judge with an assertion of *actual* bias and a reference to Canon 3C(1), pointing specifically to the Judge's earlier opinion in the Hopkins probation revocation case. The Judge does not dispute that fact. From that fact, there is clear and convincing evidence that on and after October 28, 1991, the Judge was aware of circumstances that in fact made Canon 3C(1) applicable in the Hopkins juvenile case. However, that satisfies only one of the two predicates for a wilful violation of the canon.

Although we assume for the sake of discussion that the Judge ultimately should have recused himself in the Hopkins juvenile case pursuant to Canon 3C(1), we conclude that there is not clear and convincing evidence of the other necessary predicate, *viz.*, that the Judge intended to cause a result or take an action contrary to the applicable rule of judicial conduct.

The record shows that the Judge scheduled a hearing for November 6, 1991, specifically to consider the question of his disqualification based on Anderson's October 28-29 assertion of actual bias and his reliance on Canon 3C(1). On November 5, 1991, the presiding judge ordered that the November 6 hearing

be postponed and that the issue of the Judge's disqualification be submitted to another judge. The Judge, however, did not consider that order to be valid, and he attempted to hold a hearing on November 6 on the question of his disqualification for alleged actual bias. Neither Hopkins nor Anderson appeared on November 6, and the juvenile case was continued to December 4. On November 25, 1991, Hopkins filed a petition for a writ of mandamus in this court, and this court thereupon stayed the juvenile case pending the resolution of that mandamus action. Ultimately, this court concluded that Hopkins' October 25 disqualification motion was timely and should have been granted. *State ex rel Hopkins v. Schenck, supra*, 313 Or at 538-39. Thus, the Judge in fact never ruled on the questions of his alleged *actual* bias and the applicability of Canon 3C(1) to the *Hopkins* juvenile case.

Under those circumstances, we conclude that there is not clear and convincing evidence that the Judge consciously intended to cause a result or take an action contrary to Canon 3C(1). The Judge took actions that he believed were consistent with trying to resolve the question of his disqualification for alleged actual bias and the applicability of Canon 3C(1). Because of the presiding judge's intervening order and then the mandamus action, a disposition of the disqualification issue on the merits was never made by the Judge. Contrary to the conclusion of the Commission, we are not persuaded that there is clear and convincing evidence that the Judge wilfully violated Canon 3C(1) in the *Hopkins* juvenile case.

B. *The Roper case*

On November 27, 1991, lawyer Anderson, who also represented a party in the case of *Roper and Roper*, moved to disqualify the Judge. The motion cited Canon 3C(1) and was based on the relationship between Anderson and the Judge described above. The Judge denied the motion as untimely under ORS 14.260. However, at a hearing on the disqualification

motion, the Judge addressed the question of disqualification under Canon 3C(1), concluding that he was not biased against either Anderson or his client.[6] The Judge further stated:

> "As far as your personal position with me, Mr. Anderson, I have told you before and I'll tell you again here in open court, that we may dispute and we may dispute vociferously what law applies to a certain case, what procedure should be applied, and how that case should be handled. And I may, at least outside this courtroom, very strongly read the riot act to you. And that is not an indication that I cannot sit on your cases or anybody else's and be fair and impartial. You're going to — you're going to have to be mature enough to take my responses to you, no matter how vociferously or energetically given, without reading into them any personality contest or other matter that would interfere with my ability to sit on cases that you present and be fair and impartial.
>
> "I will not allow you or anyone else, any attorney, to disrupt the administration of the court. I think you have in the past taken the proper procedures to challenge my rulings and you are entitled to challenge my rulings * * * in the proper manners, through the proper procedures, with the appellate courts, mandamus, or appellate actions, and I can — you know that's fine, that's part of the process. That is part of the system in which we both work. I have in this case no — no problems with regard to the Canons of Judicial Conduct. I simply do not believe that I have, in any way, shape or form, or will in any way, shape or form, by denying your motion to disqualify, violate any Canon of Judicial Conduct."

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[6] The Commission's decision is based on a violation of Canon 3C(1) (impartiality might reasonably be questioned), not on a violation of Canon 3C(1)(a) (actual personal bias or prejudice).

The question is whether *Roper and Roper* was a case in which the Judge's impartiality might reasonably be questioned, such that he should have disqualified himself. The Commission stated:

> "The Commission does not believe that Canon 3C requires a judge to be disqualified merely because an attorney has filed a complaint against the judge with the Commission on Judicial Fitness and Disability. To do so would create an opportunity for attorneys to remove judges from cases even where there did not exist a reasonable basis for questioning impartiality. Similarly, the Commission does not believe that harsh words between a lawyer and a judge necessarily require recusal. However, where the judge takes affirmative action to make public the dispute between an attorney and himself, the balance tips heavily in favor of requiring recusal. The cumulative effect of the complaint filed with the Commission, the harsh words [the Judge] had for attorney Anderson in their private conversation, and the Judge's affirmative effort to publicize both the complaint and his opinion of the complaint and of Mr. Anderson, was to create a reasonable basis for questioning [the Judge's] impartiality."

We agree with the Commission's reasoning and its conclusion.

The Judge argues that his denial of the motion to disqualify in *Roper* was challengeable on mandamus or on appeal, but not sanctionable under the Code. Even if we were to accept the Judge's characterization of his ruling, that does not mean that the Judge's ruling on the motion to disqualify in *Roper* was not cognizable by the process for judicial discipline. That process for judicial discipline is independent of, indeed *must be* independent of, a party's decision in litigation to expend the time and money

associated with pursuing a question of judicial conduct that may be examined on review.[7]

Under *In re Gustafson, supra*, 305 Or at 660, a judge's conduct is "wilful" within the meaning of Article VII (Amended), section 8, if the judge intends to cause a result or take an action contrary to the applicable rule and if he is aware of circumstances that in fact make the rule applicable, whether or not the judge knows that he violates the rule. We conclude that, for the reasons articulated by the Commission and quoted above, Canon 3C(1) dictates that the Judge should have disqualified himself in the *Roper* case. His denial of the motion to disqualify is sufficient to establish a wilful violation of Canon 3C(1). Although the Judge argues that he acted in good faith, his asserted good faith in coming to the wrong conclusion on the issue of timeliness is not relevant to the determination whether the Judge made an intentional decision that violated the canon; he violated Canon 3C(1) by continuing to sit on the *Roper* case. The good faith nature of that decision, if any, however, is a factor to be considered in assessing the appropriate sanction for a violation.

The Judge also argues that because Canon 3C(1) is phrased in terms of "should" rather than "shall," the rule is hortatory rather than mandatory. We do not believe, however, that it can be seriously argued that the term "should" in Canon 3C(1) is merely hortatory when, for example, Canon 3C(1)(a) provides that a judge "should" recuse himself or herself based on actual personal bias or prejudice. As noted, the appearance of impartiality

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[7] Even when that same judicial conduct is or might be punishable in some other forum on the basis of other laws, nothing in Article VII (Amended), section 8, of the Oregon Constitution, or in ORS 1.420, purports to limit the jurisdiction of this court or the Commission to inquire into wrongful judicial conduct. *In re Fadeley, supra*, 310 Or at 558.

required by Canon 3C(1) is important, and the requirement of recusal is no less stringent in that case.[8]

The Judge argues that disciplining him for violating Canon 3C(1) would violate the Fourteenth Amendment because Canon 3C(1) "does not give 'notice' that the particular conduct of [the Judge] in denying the motions to disqualify in the *Hopkins*, *Roper*, *Kiemnec*, and *Porter* cases was conduct that would violate the Canon and serve as a basis for discipline."[9] We disagree. Canon 3C(1) requires a judge to recuse himself or herself in any matter in which the judge's impartiality "might reasonably be questioned." That is an objective test of a type that judges routinely are asked to apply. The judge can ascertain whether there is an objective factual basis for a party or lawyer reasonably to question the judge's impartiality. If there is, as there was in the *Roper* case, then ordinarily that will suffice for the judge to be recused.

C. *The Kiemnec case*

On December 31, 1991, Anderson filed a motion to disqualify the Judge in the case of *Kiemnec and Kiemnec*. The situation in *Kiemnec* was similar to that in *Roper*, except that in *Kiemnec* the Judge did not hold a hearing on the motion. The Judge claims here that there was no point in repeating the substance of the *Roper* hearing in the *Kiemnec* case, although, by referring

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[8] In context, the term "should" is used in the canon in order to allow for the fact that Canon 3D provides for certain cases in which disqualification will not be required under Canon 3C(1)(c) (financial interest) or Canon 3C(1)(d) (relational interest), based on adequate disclosure by a judge and the written consent of the parties.

[9] The range of constitutional challenges based on "vagueness" is discussed in *Megdal v. Board of Dental Examiners*, 288 Or 293, 296-303, 605 P2d 273 (1980). We will assume, *arguendo*, that the challenge in this case may be cognizable generally as a federal due process claim under the Fourteenth Amendment. *Id.* at 300-03 (recognizing the uncertain state of federal law in this area).

exclusively to timeliness as a grounds for denial and ignoring the question of disqualification for actual bias and Canon 3C(1), his written order denying the motion seems to belie that claim. The Commission came to the same conclusion in the *Kiemnec* case as in the *Roper* case. For the reasons stated above, we agree with the Commission's reasoning and its conclusion.

D. *The Porter case*

On February 21, 1992, the Judge filed a complaint with the Oregon State Bar regarding the conduct of Anderson. The complaint accused Anderson of making false statements to the Commission, of making false statements to the Supreme Court in the *Hopkins* mandamus case, and of making false statements to the circuit court in a motion for change of venue in another case. On the same day, the Judge sent a letter to Anderson and three other lawyers, accusing Anderson of a "vendetta" to discredit and destroy him. The letter also states:

> "[D]ue to the unabated animosity and unabated misrepresentations being made by Mr. Anderson against me as judge through affidavits and letters, it is apparent to me that Mr. Anderson and I cannot work together and may never be able to."

On March 23, 1992, Anderson moved to disqualify the Judge in the case of *Porter and Porter*. The Judge denied that motion as untimely.

The situation in the *Porter* case is similar to that in the *Roper* and *Kiemnec* cases, with the significant additional overlay of the Judge's February 1992 complaint about Anderson to the Oregon State Bar and his letter accusing Anderson of a "vendetta" and stating the Judge's inability to work with Anderson.

The Judge's thinking on the subject of judicial disqualification was reflected in his February 21, 1992, letter to Anderson and several other lawyers, in which he asserted:

> "If the time has passed for filing a motion to disqualify, the attorney who feels that the judge is prejudiced against him must step aside and see that his clients get representation by counsel who can in fact work with the judge before whom the case is pending."

The Judge's apparent conclusion — that essentially he was free to disregard a disqualification motion made in reliance on a claim of *actual* bias or on Canon 3C(1) once the time had run on a statutory disqualification motion — is untenable. The gist of his position, *i.e.*, if Anderson reasonably questioned the Judge's impartiality, then Anderson either must accept a judge whose impartiality Anderson thought was questionable or cease to represent clients in the Judge's court, appears to have been retributive and not simply a good faith legal decision based on the statutory time requirements.

For the same reasons supporting our decision in the *Roper* and *Kiemnec* cases, we conclude, *a fortiori*, that the Judge wilfully violated Canon 3C(1) by denying Anderson's motion to disqualify him in the *Porter* case.

In summary, we conclude that the Judge wilfully violated Canons 1, 2A, and 3C(1) in the *Roper*, *Kiemnec*, and *Porter* cases.[10] We further conclude that there was no wilful violation of those canons in the *Hopkins* juvenile case.

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[10]The Judge argues that t[illegible]lanket disqualifications of judges by attorneys in counties as unpopulated as Wallowa and Union County will have a serious adverse effect on the administration of justice in those counties and that a judge should be able to take that fact into account in making a recusal decision. Although we are aware of the logistical problems associated with changing judicial assignments, especially in rural counties, we cannot countenance a system where the Code is different depending on the size of the county or under which people in less populated counties would be required to accept a different standard of judicial impartiality. The Code applies equally to all Oregon judges.

CANON 3A(4)

Canon 3A(4) provides in part:

> "A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. * * *"

The Commission concluded that the Judge had wilfully violated Canons 1, 2, and 3A(4) by initiating *ex parte* communications in two separate matters: (1) in a conversation with District Attorney Goebel, relating to the judge's disqualification in *State v. Vaughan*; and (2) in a letter to a justice of this court after the opinion in *State ex rel Hopkins v. Schenck, supra*, was released. We conclude that the Judge wilfully violated Canons 1, 2, and 3A(4) in the *Vaughan* case, but not in the *Hopkins* mandamus case.

A. *The Vaughan case.*

The Judge conducted a pretrial release hearing in *State v. Vaughan*, consolidated criminal cases in which the defendant was represented by counsel and the state was represented by Wallowa County District Attorney Mary Goebel. The Judge set pretrial release conditions with which District Attorney Goebel did not agree.

On June 9, 1992, Goebel filed a motion to disqualify the Judge in the *Vaughan* case. On June 16, the Judge initiated a private conversation with Goebel. On June 17, pursuant to ORS 14.260(1), the Judge challenged the good faith of Goebel's disqualification motion in *Vaughan*. On June 17-18, Goebel made notes of her June 16 conversation with the Judge. The question of a wilful violation of Canon 3A(4) turns on what transpired during the private conversation initiated by the Judge.

In his brief to this court, the Judge states that "[t]his is the only charge regarding which there was some dispute as to the facts and a need for the Commission to judge the relative credibility of the witnesses, namely Ms. Goebel and [the Judge]." The Commission found clear and convincing evidence of a violation, finding that the district attorney's testimony was "more credible":

> "In judging the credibility of these two witnesses, the Commission was influenced by the demeanor of the witnesses and the consistency of Ms. Goebel's testimony with her prior written statement. Much of [the Judge's] testimony in this proceeding, by contrast, was different in tone and substance from what he wrote."

Even on *de novo* review, determinations of credibility are given significant weight when based on the factfinder's perception of a witness's demeanor. *Clauder v. Morser*, 204 Or 378, 391-92, 282 P2d 352 (1955). This basic principle certainly is applicable to a conclusion by a factfinding commission such as this one, which was composed of three trial judges, two lawyers, and two public members in attendance at the hearing. The weight that we accord to the credibility determination based on demeanor also is informed by the fact that the Commission went beyond a mere recital of conclusions about demeanor to state the basis for its conclusions. To the extent, however, that the credibility determination is based on a comparison of the substance of the witnesses' testimony with the substance of other evidence, then this court on *de novo* review is as well equipped as is the Commission to make that record determination.

Although the Commission's credibility determination in this matter was based in part on the consistency of the district attorney's testimony with her prior written statement, the Commission neglected to note the reason for that consistency, which was elicited at the hearing during the cross-examination of the witness:

"Q. Okay. Now, your discussion here today, my sense is that you pretty much read from these notes [the notes made by the district attorney on June 17-18 of the June 16 conversation] which are Exhibits 196 and 197?

"A. That's correct.

"Q. And would it be fair to say that that pretty much is your recollection today, as we sit here today?

"A. That's correct.

"Q. However many years ago that was now, or months ago, that you are relying pretty much on those notes?

"A. I am."

The consistency in the district attorney's testimony with her contemporaneous notes of the conversation appears to stem from her reliance on the notes in her testimony, not necessarily from any independently credible present recollection of the events. Thus, although we give substantial weight to the Commission's findings based on demeanor, we are less persuaded by its reliance on the "consistency" in the district attorney's testimony.

In assessing the dispute about what was said during the June 16, 1992, conversation between the Judge and Goebel, we have reviewed and considered the following: the testimony of the Judge and Goebel at the Commission hearing; the pertinent exhibits, including Goebel's relatively contemporaneous notes of the conversation and the contents of the Judge's June 17, 1992, affidavit, which alludes to matters discussed in the conversation the preceding day; the Judge's supplemental affidavit filed in this court concerning that conversation; the parties' briefs; and the Commission's conclusion concerning credibility based on the demeanor of the witnesses.

We find by clear and convincing evidence the following historical and ultimate facts. After a hearing on June 16, 1992, in

a case unrelated to *State v. Vaughan*, the Judge asked to speak privately to Goebel. The two of them met in the district attorney's office for about one half hour. The Judge "initiated" the conversation.

At that time, *Vaughan* apparently was the only case in which the district attorney had moved to disqualify the Judge. The Judge challenged the district attorney's disqualification motion in *Vaughan* the next day. The motion to disqualify in *Vaughan* was a "pending proceeding" within the meaning of Canon 3A(4), and the Judge's challenge to the motion either was a part of that proceeding or, alternatively, was an "impending proceeding" within the meaning of Canon 3A(4).

The Judge's affidavit of June 17, 1992, challenging the district attorney's good faith in moving for his disqualification in *Vaughan*, first addresses his asserted lack of bias in *Vaughan* and then states in paragraph 11:

> "I believe the affiant, Mary Goebel[,] has made and filed this Motion to Disqualify without foundation or basis.
>
> "I can only speculate that she has confused, misperceived [*sic*] or mistaken something I have said or done as indication of a personal belief or philosophy that she interprets as being inconsistent with my ability to set [*sic*] as a judge and be fair and impartial in this particular case or cases of this particular type. If so, I believe she has arrived at this conclusion because of inexperience. I have no such personal belief or philosophy, etc. that would affect my ability to be fair and impartial in this case or any like it.
>
> "If there is something in a particular case that causes me concern about my ability to be fair and impartial, I have no reluctance in revealing such and stepping aside.
>
> "I file this challenge for the purpose of airing this issue because of its importance to the administration of justice in

Wallowa County and, therefor to the citizens of Wallowa County.

"Ms. Goebel is the elected District Attorney and the sole occupant of that office in Wallowa County.

"I am the elected Circuit Court Judge and the sole occupant of that office in Wallowa County.

"It is crucial that the District Attorney and the Judge be able to work together even if they do not always agree, and they will not. This is a tough profession and a tough business. It is not a place for the faint of heart, the overly sensitive or the immature."

Each of the assertions made in paragraph 11 of the Judge's affidavit relates directly to matters that the Judge raised privately with Goebel on June 16. The Judge's own testimony to the Commission and his brief and affidavit to this court readily acknowledge that those were the same matters that he had raised in his private meeting with Goebel.

The Commission concluded, as do we, that the Judge initiated an *ex parte* communication, the subject and substance of which related directly to the pending or impending motion to disqualify the Judge in *Vaughan* and to his challenge to that motion. The Judge acknowledges that there were circumstances in the *Vaughan* case that made him aware of the applicability of Canon 3A(4); indeed, he contends that he tried to act within the permissible parameters of that canon. Nonetheless, we conclude that the Judge's conduct constituted a wilful violation of Canon 3A(4).

Moreover, we also find clear and convincing evidence in the record that the conversation, which the Judge asserts was focused on the general subject of his disqualification in several cases, included specific references to *Vaughan*, which was the only disqualification motion pending or, apparently, that had been filed by the district attorney. The conversation related not

only to the various reasons why the Judge was going to contest the district attorney's good faith motion in *Vaughan*, but also to pretrial release conditions generally and in *Vaughan* specifically. Those facts further establish a wilful violation of Canon 3A(4).

B. *The Hopkins mandamus case.*

After this court issued its decision in *State ex rel Hopkins v. Schenck, supra*, in which the court directed that a peremptory writ issue, the Judge sent a letter to the justice who was the author of the court's opinion. The letter was received at the court on July 24, 1992. Copies of the letter were not sent to the other party or counsel. The letter was signed by the Judge as "R.D. Schenck Circuit Judge."

The letter stated that the Judge's "only gripe" concerning this court's opinion was with what the Judge labeled a "gratuitous" quotation of a statement by Anderson. The letter asserted that Anderson's statement was untrue and that the Judge had never had an opportunity to challenge it in the mandamus case. At the time the Judge's letter was received, the time for a petition for reconsideration of this court's mandamus decision had not yet expired.

The Judge's letter thus was an *ex parte* communication concerning a pending proceeding. It was initiated by the Judge in his capacity as a defendant in a mandamus action. We conclude that sending the letter during the formal pendency of the mandamus case violated Canon 3A(4). In this instance, however, we do not conclude that the Judge committed a "wilful violation" of Canon 3A(4).

There is not clear and convincing evidence that the Judge was aware of circumstances that made the *ex parte* rule apply on these facts, as is required for a "wilful violation" under *In re Gustafson, supra*, 305 Or at 660. Specifically, the record does not establish by clear and convincing evidence that the Judge was aware that the *mandamus* case was still "pending" for purposes of the *ex*

parte rule, after this court had issued its decision and had ordered a peremptory writ to issue, but before the period for a petition for reconsideration had expired.

In summary, we conclude that the Judge wilfully violated Canons 1, 2A, and 3A(4) in the *Vaughan* case, but not in the *Hopkins* mandamus case.

CANONS 1, 2A, AND 3A(6)

Canons 1 and 2A are set forth, *supra*, __ Or at __ (slip op at 3-4).

Canon 3A(6) provides:

> "A judge should abstain from public comment about pending or impending proceedings in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court."

The Commission concluded that the Judge wilfully violated Canons 1, 2A, and 3A(6) by writing a letter to the editor of the Wallowa County Chieftain that was published September 17, 1992, and by writing a "guest editorial" for the same newspaper that was published October 1, 1992.[11] For the reasons that follow, we agree with the Commission's conclusions.

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[11] *See* Appendix.

The brief of *amicus curiae* ACLU Foundation of Oregon, Inc., is limited to addressing the Commission's recommendation that the Judge be disciplined for publicly criticizing the Wallowa County District Attorney. The *amicus curiae* assumes, *arguendo*, that such conduct violates the Code but, nonetheless, concludes that Article I, section 8, of the Oregon Constitution, and the First Amendment to the Constitution of the United States protect the Judge from discipline for publicly criticizing the district attorney. *Amicus* does not address the Commission's recommendation that the Judge be disciplined for other misconduct.

A. *Wilful violation of Canon 2A*

The Judge's letter to the editor states in part:

> "The conditions I set in the Vaughan case were tough and reasonable.[12] All Ms. Grote [*sic*] had to say was she demanded even tougher conditions and place the blame on me. Unfortunately her immaturity led her to view herself as the knight on the white charger and to set herself up as all knowing and righteous in her own position. Therefore, I am the devil to be avoided at all costs.
>
> "If Ms. Grote [*sic*] maintains her position [presumably regarding disqualification], the county will not have the services of the Circuit Judge elected by the voters of this county to hear felony criminal cases. Instead, [the presiding judge] or a visiting judge will handle the Circuit Court criminal jurisdiction and the county will be served by a district attorney who has demonstrated a total lack of present ability, experience and maturity to handle the job of District Attorney. I will expand on the latter with specifics in another report."

The "report" that followed two weeks later in the Judge's guest editorial was, as promised, an extended essay on Goebel's asserted lack of competence, experience, professional demeanor, and personal maturity, citing specific instances in identifiable cases in the Judge's court, as well as general matters relating to her professional demeanor. The editorial concluded:

> "Ms. Goebel is a lovely young lady. But she has placed herself in a position for which she has neither the training or experience to perform the duties competently.

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[12] As noted, the *Vaughan* cases were pending at the time the Judge wrote his letter to the editor.

> "Unfortunately, in this instance, it is the public that will get the short end of the stick."

After discussing historical problems in attracting a qualified or motivated district attorney in the county, the editorial ultimately concluded:

> "Perhaps the county court [the local governing authority] needs to investigate what alternatives might be available to ensure the county has a vigorous, competent prosecutor."

Those statements by the Judge, regardless of the Judge's belief in their truth or whether they are in fact true, do not preserve or promote public confidence in the integrity and impartiality of the judiciary. After those public broadsides, which the Commission found to exhibit "a maliciousness towards Goebel which was remarkable in its intensity and in the public way in which [the Judge] chose to display it," the public reasonably might have questioned the Judge's impartiality in any matter involving Goebel. The statements, therefore, are inconsistent with Canons 1 and 2A.

The Judge's statement in the editorial that a "judge must maintain impartiality, especially in criminal trials and cannot help either side present their case," does not invalidate our conclusion in that regard.[13] Although that statement is true, and

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[13] The editorial expressly discussed the issue of the Judge's alleged bias against the state:

> "[Ms. Goebel] accuses me of being biased against the State. The problem is really the opposite for me as judge. The real problem I face with Ms. Goebel is how do I insure that the State gets a fair trial? How do I insure that the people of Wallowa County have their case against the criminal defendant properly and competently presented — when it is obvious that the people's prosecutor often does not have a clue as to how to proceed?
>
> "The judge's hands are tied for the most part. The judge must maintain impartiality, especially in criminal trials and cannot help either side present their case."

although it may reflect the Judge's concern for promoting the public's confidence in the Judge's impartiality, the weight of the Judge's unsolicited public criticism of Goebel's alleged lack of competence, experience, professional demeanor, and personal maturity overwhelms the quoted statement.

We conclude that there is clear and convincing evidence in this record that the Judge was aware of circumstances making Canon 1 and 2A applicable in these circumstances and that his attack on the district attorney was a wilful violation of Canons 1 and 2A.

B. *Wilful violation of Canon 3A(6)*

Canon 3A(6) generally prohibits judicial public comment about pending or impending proceedings in any court, except public statements in the course of official duties to explain for public information the procedures of the court. There is little doubt that the letter and editorial are public comment by the Judge on matters pending or impending in the Wallowa County Circuit Court. After a general discussion of the subject of pretrial release conditions, the letter contains specific reference to the pretrial release conditions in *State v. Vaughan*, pending cases. The editorial refers at length to the Judge's opinion that Goebel lacked competence to represent the state in Wallowa County criminal prosecutions (*viz.* pending and impending cases in the circuit court), wherein Goebel is the only criminal prosecutor. There also is little doubt that the circumstances were such that the Judge was aware of facts that would make Canon 3A(6) applicable.

Many of the Judge's statements do not meet the exception in Canon 3A(6) for "public statements in the course of official duties" or for "explaining for public information the procedures of the court." The statements were not made in the course of the Judge's official duties. Although the Judge's guest editorial calls itself a "report on my observations and evaluation of the perfor-

mance of Mary Goebel as District Attorney for Wallowa County," a circuit court judge has no duty to make such a report, much less one to a newspaper. Although there is some information in both the letter to the editor and the guest editorial that might qualify as public information about court procedures, there is much in each communication that does not.

For example, the statement that a "judge must maintain impartiality, especially in criminal trials and cannot help either side present their case," may qualify as public information about court procedure. By contrast, statements such as "[s]he does not have a grasp of how to present a witness," "[s]he does not understand the purpose of expert testimony in sex abuse cases," "she has placed herself in a position for which she has neither the training or experience to perform the duties competently," and "[t]he real problem I face with Ms. Goebel representing the State is how do I insure [*sic*] that the State gets a fair trial?" do not qualify as explaining court procedure for public information.[14] The presence of some permissible information does not sanitize the other material in each communique that is a public comment about pending or impending circuit court cases.

We conclude, accordingly, that there is clear and convincing evidence in this record that the Judge wilfully violated Canon 3A(6). The text and context of that provision do not, expressly or by necessary implication, carry with them the requirement that the statement be made with the intent to affect the outcome or to impair the fairness of a particular case. Rather, the provision clearly delineates permissible from impermissible judicial declarations concerning pending or impending cases, with the scope of the prohibition subject, of course, to constitutional limitations

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[14] The Commission concluded that the Judge's statements created the impression that the Judge would have to perform the prosecutor's role and would be biased in favor of the State in order to make up for the alleged incompetence of the district attorney. That conclusion appears to be warranted.

on the regulation of speech. *See generally In re Fadeley, supra*, 310 Or at 559-71 (concerning constitutional limits on the regulation of judicial speech); Gross, *Judicial Speech: Discipline and the First Amendment*, 36 Syracuse L Rev 1181, 1230-36 (1986) (discussing the relationship between Canon 3A(6) and the First Amendment, noting that, as of 1986, no case had specifically raised the issue); McMahon, Annot., *First Amendment Protection For Judges Or Government Attorneys Subjected To Discharge, Transfer, Or Discipline Because Of Speech*, 108 ALR Fed 117, §§ 3-9 (1992).

C. *Canon 4A does not excuse the violations of Canons 1, 2A and 3A(6)*

Canon 4 provides in part:

> "A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast doubt on his or her capacity to decide impartially any issue that may come before the judge:
>
> "A. A judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice."

As we have already held, the Judges's writings in this case, even if we were to assume *arguendo* that they pertain only to "the law, the legal system and the administration of justice," do, in fact, cast doubt on the Judge's "capacity to decide impartially any issue that may come before the judge" in matters involving Goebel. Canon 4A does not authorize what Canons 1, 2A, and 3A(6) prohibit in this case.

D. *Application of Canons 1, 2A, and 3A(6) does not violate the Judge's constitutional free speech rights.*

1. *The Oregon Constitution.*

Article I, section 8, of the Oregon Constitution, provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

It would be possible to dismiss the Judge's arguments under Article I, section 8, of the Oregon Constitution by resort to *stare decisis*. We have held that the right of a person subject to the Code, under Article I, section 8, to "speak * * * freely on any subject whatever" was "modified" by the subsequent adoption of Article VII (Amended), section 8, relating to judicial discipline.

> "We have no difficulty in holding that, in this context, it is Article I, section 8, that is modified. * * * We hold that Canon 7B(7) does not offend Oregon Constitution, Article I, section 8, because rules such as Canon 7B(7) were contemplated as a consequence of the adoption by the people of Oregon Constitution, Article VII (Amended), section 8." *In re Fadeley*, *supra*, 310 Or at 560.

Canons 1, 2A, and 3A(6) of the Code were in existence before Article VII (Amended), section 8, was adopted. Thus, as we did in *In re Fadeley*, *supra*, when considering Canon 7B(7) (concerning fundraising by a judicial candidate for election), we could hold that discipline for a violation of Canons 1, 2A, and 3A(6) does not violate Article I, section 8, of the Oregon Constitution. We choose, however, not to ground our decision in this case on the Article VII (Amended), section 8, rationale of *In re Fadeley*, because two of the three permanent members of this court who are participating in the present panel dissented from that portion of the rationale. *See In re Fadeley*, *supra*, 310 Or at

591-98 (Unis, J., dissenting in an opinion in which Van Hoomissen, J., joined). However, there is a separate, traditional line of analysis under Article I, section 8, of the Oregon Constitution, that yields the same result under the facts of the present case.

Notwithstanding its unequivocal holding, *In re Fadeley* went on to state in *dictum* that:

> "Even if the adoption by the people of subsection (e) to Article VII (Amended), section 8, of the Oregon Constitution were *not* a qualification on the rights guaranteed by Article I, section 8, of the Constitution [the court having just held that it *was* a qualification of those rights], traditional analysis under Article I, section 8, would yield the same result in this case. The right to speak, write, or print freely on any subject whatever, is not absolute. It may be curtailed, for example, in the regulation of certain professions. The case of *In re Lasswell*, *supra*, is illustrative." *Id.* at 561 (emphasis added).

This court then proceeded to discuss the "traditional analysis" by reference to *In re Lasswell*, 296 Or 121, 673 P2d 855 (1983) (lawyer disciplinary case involving public comments by the district attorney on facts relating to an investigation that led to 50 arrests and indictments). *In re Fadeley*, *supra*, 310 Or at 561-64. The principal point examined by the court in that context was whether the speech in question was such as to pose "a serious and imminent threat to the process" and was, therefore, "incompatible" with the public servant's "official function," such that the restriction on speech was valid. *In re Fadeley*, *supra*, 310 Or at 563; *In re Lasswell*, *supra*, 296 Or at 124-27.

In making that determination, the court in *Fadeley* "balanced" the competing interests (the regulatory interest and the individual's interest) along with a consideration of the precise nature of the restriction on speech. *In re Fadeley*, *supra*, 310 Or at 563. The

court concluded that the Code's restriction on personal fundraising by a judicial candidate was justified by the "profound" stake that the public has in the fact and appearance of integrity and impartiality of the judiciary and the limited impairment of the judicial candidate's fundraising and speech imposed by the rule. *Id.* at 563, 565, 571.

For essentially those same reasons, discussed more fully below in the context of our discussion of the Judge's First Amendment challenge, we conclude that even an application of "traditional" Article I, section 8, principles to this case would yield the same result that the court reached in that case. That is, we hold that the Judge's actions in causing the publication of the letter and the editorial posed a serious and imminent threat to the public's confidence in the integrity and impartiality of the judiciary in general and of the Judge himself in particular. Thus, the Judge wilfully violated Canons 1 and 2A. Similarly, we hold that the Judge's actions were a direct comment on the quality of prosecution to be expected in pending and impending criminal matters that were to come before him in Wallowa County. Such wilful violations of Canon 3A(6) similarly created a serious and imminent threat to the public's confidence in the integrity and impartiality of the judiciary — the value that the Canons manifestly are intended to protect. Under *In re Lasswell, supra*, imposition of a sanction on an elected public official in such circumstances does not violate that person's rights under Article I, section 8, of the Oregon Constitution. We now hold in this case that the imposition of discipline under Canons 1, 2A, and 3A(6) does not violate Article I, section 8, of the Oregon Constitution.

2. *The United States Constitution*

The First Amendment to the Constitution of the United States provides in part:

"Congress shall make no law * * * abridging the freedom of speech * * *."[15]

The Judge argues that, even if the restrictions on speech embodied in Canons 1, 2A, and 3A(6) do not offend the Oregon Constitution, they do impermissibly interfere with political speech protected by the First Amendment to the Constitution of the United States. This case does not fit neatly into the existing analytical framework for First Amendment analysis. The speech here is addressed to a matter of legitimate public concern, a form of political expression, "at the heart of the values expressed in the First Amendment," entitled thereby to exacting constitutional scrutiny when it is regulated. *In re Fadeley, supra*, 310 Or at 565 (citing *Buckley v. Valeo*, 424 US 1, 25, 96 S Ct 612, 46 L Ed 2d 659 (1976)). However, the case also has similarities to the line of cases dealing with speech by public employees. *See Shockey v. City of Portland*, 313 Or 414, 424-31, 837 P2d 505 (1992) (analyzing traditional public employee speech under the First Amendment); *Scott v. Flowers*, 910 F2d 201, 211-12 (5th Cir 1990) (considering the discipline imposed on an elected justice of the peace under the usual analysis applied to public employee speech, while also recognizing that the justice of the peace "was not, in the traditional sense of that term, a public *employee*." (Emphasis in original)). Although we would reach the same result applying the analysis from *Buckley v. Valeo, supra*, we will apply the traditional public employee free-speech analysis in this case. *Compare In re Fadeley, supra*, 310 Or at 565 (discussing and applying *Buckley v. Valeo* in judicial discipline context).

In *Pickering v. Board of Education*, 391 US 563, 568, 88 S Ct 1731, 20 L Ed 2d 811 (1968), the Supreme Court stated that,

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[15] The First Amendment applies to the states by application of the due process clause of the Fourteenth Amendment. *New York Times Co. v. Sullivan*, 376 US 265 n 4, 84 S Ct 710, 11 L Ed 2d 686 (1964).

while a public employee is not compelled to relinquish First Amendment rights to comment on matters of public interest, those rights must be weighed against the interest of the state as an employer in regulating the speech of its employees, to promote the efficiency of the public services the state performs through its employees. In *Connick v. Myers*, 461 US 138, 103 S Ct 1684, 75 L Ed 2d 708 (1983), the Court followed the *Pickering* framework, stating that the balancing required "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *id.* at 150, how much of the employee speech substantially involved matters of public concern, *id.* at 154, and the manner, time, place and context of the speech. *Id.* at 152-53. In *Rankin v. McPherson*, 483 US 378, 388, 107 S Ct 2891, 97 L Ed 2d 315 (1987), the Court again applied *Pickering*, stating:

> "[T]he state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest."

The Court also added that "[t]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." *Id.* at 390.

In this case, we conclude that the governmental interest that we have already recognized from the Code, *viz.*, an interest in protecting both the fact and the appearance of the impartiality and integrity of its judiciary, is profound. *See In re Fadeley*, *supra*, 310 Or at 563, 571 (so characterizing that governmental interest). The prohibition on comments on pending or impending cases, and the prohibition on comments that undermine the public's confidence in the judge's impartiality, are directly related to the furtherance of that interest. The former prohibition

is closely drawn to achieve those interests; the latter is more general in its reach. Neither is impermissibly overbroad on its face.

The degree of interference with the judge's right to speak that we hold to be permissible here, particularly in the context of pending or impending cases, is appropriate to the circumstance. It is a limited restriction on the Judge's right to speak freely and publicly. The application of that limitation in this case — *viz.*, to restrict a judge's right to "report" to the public on the specific and general competence and professional/personal maturity and demeanor of the district attorney, which report reasonably calls into question at least the Judge's impartiality towards the district attorney and, derivatively, the public interest that she represents — does not offend the First Amendment. The limitation on speech in this case is directly related to, and is narrowly drawn so as to further, the governmental interest in maintaining the fact and the appearance of an impartial judiciary, and is justified by the profound nature of that interest. On these facts, we conclude that the First Amendment does not insulate the Judge's violations of Canons 1, 2A, and 3A(6) from discipline.

For a contrary conclusion, the Judge relies on *Scott v. Flowers*, *supra*, in which the United States Court of Appeals for the Fifth Circuit voided the discipline imposed on a justice of the peace for criticizing a higher county court in an interview and in an "open letter" published in the local newspaper. *Scott* is the only case cited by the parties where issues similar to this case were addressed.

Scott was an elected justice of the peace in Fort Bend County, Texas, where justice courts are not courts of record and, on appeal, defendants are entitled to trials *de novo* in the county court. Apparently, the great majority of the defendants who appealed their traffic offense convictions from justice or municipal courts in the county to the county court during Scott's term in office succeeded in having the charges against them dismissed

or their fines sharply reduced. *Scott v. Flowers*, *supra*, 910 F2d at 203-04.

> "This practice, Scott believed, unfairly allowed those 'in the know' to violate the traffic laws repeatedly and with impunity while penalizing less sophisticated individuals who committed the same offenses.
>
> "In September 1983, Scott took his concerns to the local government and the citizenry by writing an 'open letter' to county officials. In the letter, Scott attacked the district attorney's office and the county court-at-law for dismissing so many traffic ticket appeals and called upon the county officials to offer suggestions to remedy the problem. If the county refused to change this practice, Scott concluded, the public at least should be made aware of it, and the court-at-law 'would be really busy then.'" *Id.* at 204.

In connection with his open letter, Scott also stated to a reporter that "the county court system is not interested in justice." *Id.* at 205. After Scott was reprimanded by the Texas Commission on Judicial Conduct, he filed an action under 42 USC § 1983 in federal district court to void that sanction. The district court granted summary judgment in favor of the Texas Commission, concluding that Scott would have been reprimanded even if he had not written the open letter and therefore that he was entitled to no relief. The district court thus found it unnecessary to reach the issue of whether Scott's conduct in writing the letter was in fact a constitutionally-protected activity. *Id.* at 206. The Fifth Circuit reversed.

The Fifth Circuit's opinion in *Scott* does not point to Texas judicial canons that parallel Canons 1, 2A, and 3A(6) of the Oregon Code of Judicial Conduct, although the Fifth Circuit and the Texas Commission on Judicial Conduct recognize the state's interest in promoting an efficient and impartial judiciary and public confidence therein. *Id.* at 204 n 3, 205 n 6, 212-13. The

decision uses a "public employee" speech analysis, *id.* at 210-13, *see also Shockey v. City of Portland, supra*, 313 Or at 424-31 (setting forth that analysis) and concludes that the speech at issue in *Scott* touches on core First Amendment values:

> "Accordingly, the Commission must carry a very difficult burden in order to demonstrate that its concededly legitimate interest in protecting the efficiency and impartiality of the state judicial system outweighs Scott's first amendment rights.
>
> "We conclude that the Commission has failed to carry that burden. Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote." *Scott v. Flowers, supra*, 910 F2d at 212-13 (footnote omitted).

Although we might agree with the Fifth Circuit's conclusion if confronted with facts identical to those in the *Scott* case, the facts in the case before us are not the same as those in *Scott*.

The similarity between this case and *Scott v. Flowers* is limited to our conclusion that the judge's comments in each case concerned a "matter of legitimate public concern,"[16] thereby implicating core First Amendment values. On the other hand,

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[16] *See Pickering v. Board of Education*, 391 US 563, 571, 88 S Ct 1731, 20 L Ed 2d 811 (1968) (first, the court must determine in light of the content, form, and context of the speech in question whether it addresses a matter of legitimate public concern).

whereas Scott's open letter addressed practices that occurred on appeal in a higher court, the Judge's comments in this case were addressed to practices by a lawyer who appeared in his court.[17] Scott's comments were primarily addressed to "bringing to light an alleged unfairness in the judicial system," comments that arguably pertain to the administration of justice on appeal and that might be permissible in Oregon under Canon 4A. In contrast, the Judge's comments here were focused primarily on criticizing the competence and personal/professional maturity and demeanor of the district attorney, thus casting into question not only the appearance, but also the fact, of the Judge's ability to be impartial in any pending or impending case in his court involving the district attorney.

Also, unlike *Scott v. Flowers*, in which the Texas Commission could not specifically articulate how Scott's remarks would impede the legitimate state interests of maintaining the appearance of an impartial judiciary and public confidence therein,[18] we already have stated in this case that Canons 1, 2A, and 3A(6) are drawn specifically to further those profound interests, and we already have concluded here that the Judge's wilful violation of those canons, including comments on pending or impending cases in his court, could cause members of the public reasonably to question his impartiality. There is nothing in the Fifth Circuit's decision in *Scott v. Flowers* that persuades us to reach a different

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[17] In *Scott v. Flowers*, 910 F2d 201, 213 n 24 (5th Cir 1990), the Fifth Circuit emphasized that its

> "holding is limited to the narrow question before us, which is whether a judge can be reprimanded for publicly commenting upon the administration of justice as it relates to cases that pass through his court."

[18] At most, the Texas Commission found that Scott's comments were destructive of public confidence in the judiciary, pursuant to the Commission's underlying authority to discipline a judge for conduct that "casts public discredit on the judiciary or on the administration of justice." *Scott v. Flowers*, *supra*, 910 F2d at 204 n 3.

conclusion under the analysis that we have followed here. For the reasons discussed, we conclude that the manner, time and place in which the Judge raised these issues makes his discipline constitutional. We hold that the First Amendment does not insulate the Judge's speech here from sanction. *See Rankin v. McPherson, supra*, 483 US at 388-90 (free speech rights balanced against interference with work, speaker's job performance, public accountability of speaker); *Connick v. Myers, supra*, 461 US at 150-52 (same); *Pickering v. Board of Education, supra*, 391 US at 568 (same).

DUE PROCESS AND OTHER CLAIMS

The Judge contends that the Commission combines investigatory, prosecutorial, and adjudicative roles, in violation of his right to procedural due process of law under the Fourteenth Amendment to the Constitution of the United States.[19] That contention is not well taken. The Commission follows a fairly standard administrative law model of contested case adjudication, and the Supreme Court of the United States has held that, without more, this administrative adjudication paradigm does not violate due process. *Withrow v. Larkin*, 421 US 35, 4647, 52, 95 S Ct 1456, 43 L Ed 2d 712 (1975) (citing 2 K. Davis, Administrative Law Treatise 175, §13.02 (1958)). Moreover, the Commission has no independent authority to discipline a judge; its recommendations are reviewed *de novo* by this court, which is the final adjudicative authority. Or Const, Art VII (Amended), § 8(1)(e); ORS 1.425(6). We hold that the operation of the Commission did not deprive the Judge of federal procedural due process.

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[19] The Fourteenth Amendment to the Constitution of the United States provides in part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law[.]"

The Judge also argues that the Commission failed to provide him with adequate notice and an opportunity to defend, in violation of his Fourteenth Amendment right to procedural due process of law and Commission rule, and that the Commission denied him his right to equal privileges and immunities under Article I, section 20, of the Oregon Constitution.[20] We have considered those arguments and find them unpersuasive.

SANCTION

In disciplining judges, this court has available several different sanctions from which to choose. The court may censure the judge, or it may suspend the judge (with or without pay) or remove the judge from office. Or Const, Art VII (Amended), § 8(1)(e); ORS 1.430(1).[21] In deciding which of those sanctions to impose in a particular case, it is necessary to consider the purposes of disciplining judges. Judges are disciplined primarily to preserve public confidence in the integrity and impartiality of the judiciary. Thus, disciplining judges serves to educate and inform the judiciary and the public that certain types of conduct are improper and will not be tolerated. Discipline of a judge also serves to deter the disciplined judge as well as other judges from

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[20] Article I, section 20, of the Oregon Constitution, provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[21] *See, e.g., In re Fadeley, supra*, 310 Or at 573 (censure); *In re Jordan*, 290 Or 303, 622 P2d 297 (1981) (removal from office); *In the Matter of Sawyer*, 286 Or 369, 384, 594 P2d 805 (1979) (no discipline imposed; prohibition on future dual service as teacher and judge); *In the Matter of Field*, 281 Or 623, 637, 576 P2d 348, *reh'g den* 281 Or 638 (1978) (removal from office). The court also has suspended a judge from the practice of law for misconduct as a judge, *In re Edwin L. Jenkins*, 244 Or 554, 560, 419 P2d 619 (1966) (decided before the adoption of Article VII (Amended), section 8(1)(e)), and has held that suspension or disbarment of a judge from the practice of law does not necessarily result in removal from the bench during the judge's term of office, *In re Piper*, 271 Or 726, 741, 534 P2d 159 (1975).

repeating the type of conduct sanctioned. *See Gross, supra*, 36 Syracuse L Rev at 1256-61 (discussing discipline to be imposed).

The Commission's recommendation states:

> "* * * [the Judge's] conduct repeatedly fell short of the governing standards of judicial conduct. In determining an appropriate sanction in judicial discipline cases, the Commission evaluates several criteria, including: the impact upon litigants and attorneys of the judge's conduct; the extent to which the conduct tends to undermine public confidence in the judicial system; the seriousness of the violations; and the extent to which the judge demonstrates an interest in avoiding similar problems in the future."

We agree with the Commission's statement of the general criteria to be evaluated in determining the appropriate sanction in judicial discipline cases. After considering those criteria in the light of testimony and evidence it received, the Commission recommended that the Judge be suspended from office without pay for a period of three months.

We have found wilful violations of Canons 1, 2A, and 3C(1) in the *Roper*, *Kiemnec*, and *Porter* cases, wilful violations of Canons 1, 2A, and 3A(4) in the *Vaughan* case, and wilful violations of Canons 1, 2A, and 3A(6) with respect to the Judge's public statements about the district attorney. We proceed to consider the appropriate sanction for those violations by first evaluating them in the context of the criteria stated above.[22]

A. *Violations of Canon 3C(1).*

Even if there is no actual, demonstrable impact from a judge's refusal to recuse himself or herself in violation of Canon 3C(1),

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[22] The violations of Canons 1 and 2A are not discussed separately in this section.

there is presumptively a significant impact on the trust of the public and the litigants in an impartial judiciary when a judge sits on a case in which the judge's impartiality reasonably may be questioned.

Here, the Judge's good faith in weighing the issue of his disqualification was evident in the *Roper* case and will be presumed in the *Kiemnec* case, each of which was a case where recusal was required, but neither of which was a case where that conclusion was beyond dispute. In the *Porter* case, however, the record does not establish that the Judge gave the issue of his disqualification under Canon 3C(1) adequate, if any, consideration, although his recusal clearly was required after the judge had complained so vehemently to the Bar about Anderson and sent his letter stating that he no longer could work with Anderson.[23] The violations of Canon 3C(1) in the *Roper* and *Kiemnec* cases were relatively minor; the violation in the *Porter* case, however, was serious.

Before the Commission, the Judge vigorously defended his position, and the Commission stated in its findings:

> "During the course of [the Judge's] testimony, it became clear that the Judge believes that, in every instance cited in the Commission Complaint, his conduct was consistent with [the Code's] high standards. There was, therefore, no acknowledgment on his part that he would learn anything from the proceeding or be more attentive to his obligations under the Code in the future. To use a slightly overworked phrase of the day, in the Commission's opinion, [the Judge] 'just does not get it.'"

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[23] We do not suggest that in every instance in which a judge calls a matter about an attorney to the attention of the Oregon State Bar that the judge must, *ipso facto*, recuse himself or herself from any matter involving that attorney. The question is matter specific.

In his brief to this court, the Judge responded:

> "As to the disqualification and speech issues, it is [the Judge's] opinion that the Commission never got it and probably still hasn't. The Commission demonstrated a serious lack of understanding of the law in these areas, and [the Judge] has paid dearly for that."

Certainly any person, judge or not, accused of violating a code of professional conduct has the right to defend himself or herself vigorously. A vigorous defense does not *necessarily imply* that the accused judge is insensitive to a problem or to suggest that, if a violation is found by this court, the judge will not seek to correct that problem. Nevertheless, at least with respect to the Judge's conduct in the *Porter* case (and his unsuccessful attempt to defend his conduct in that case before the Commission and before this court on the grounds of sound judicial administration), we confess a genuine concern about the Judge's resolve either to understand the true nature of such problems or to avoid them in the future.

B. *Violation of Canon 3A(4).*

The Judge's *ex parte* contact with District Attorney Goebel in the *Vaughan* cases apparently had no impact on the parties, the attorneys, or the merits of the cases. Moreover, on this record, we cannot say that by itself the contact had a significant impact on the public's confidence in the judiciary. Nonetheless, the violation of Canon 3A(4) was clear, and the Judge has asserted in this court that now he does "get it" with respect to such contacts, and that he will avoid them in the future. We accept that assertion, particularly because it exists in marked contrast to the Judge's attitude with respect to his other violations.

C. *Violation of Canon 3A(6).*

The Judge's public comments about pending or impending proceedings in his court and about the district attorney were

improper. By calling into question the appearance, if not the fact, of the Judge's ability to be impartial to the district attorney, the comments tend to undermine public confidence in the judicial system. Because of the calculated, unsolicited, and personal nature of the comments, we consider the violation of Canon 3A(6) in this instance to be serious. Based on the totality of the record, we are not fully persuaded that the Judge will seek to avoid such comments in the future.

D. *Sanction*

Having laid out in detail the violations of the Code and how they relate to the sanction determination, we turn to consider the proper sanction. The Judge contends that no sanction is appropriate. The Commission recommended a suspension of three months without pay.[24]

Neither party has cited authorities bearing on the question of the appropriate sanction. The ABA Model Code of Judicial Conduct (1990) contains no pertinent provisions, and the case law from other jurisdictions varies widely and is of little value in this respect. *See generally Judicial Discipline and Disability Digest: 1960-1978*, Part 5: Judgment (Rosenbaum, ed., 1981, Supp 1991). We shall consider the question of an adequate sanction in the context of the factors that we have already addressed and with reference to our own prior judicial discipline decisions, without suggesting by doing so that the decisions discussed below provide an exclusive list of appropriate circumstances for the imposition of a particular sanction.

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[24] This court, not the Commission, is charged with the constitutional duty and authority to determine and impose a sanction in this judicial discipline case. Accordingly, the Commission's recommendation for sanction does not receive any deferential consideration in this court, however, to the extent that it is well-reasoned, it can be a useful referent for the court. *See In re Fadeley*, *supra*, 310 Or at 571-573 (quoting at length from and ultimately agreeing with the Commission's censure recommendation).

Removal from office is appropriate where the judge is not competent to perform the duties of the office, *In the Matter of Field, supra*, 281 Or at 634-37, or where a series of misconduct incidents calls into question the judge's competence and integrity, *In re Jordan*, 290 Or 303, 336-37, 622 P2d 297, *reh'g den* 290 Or 669 (1981). This court has also stated in *dictum* that:

> "Whether removal is the appropriate solution depends not only on the magnitude of the violation but also on the probability of the violation's recurrence. If the violation is likely to recur, removal is appropriate." *In the Matter of Field, supra*, 281 Or at 635.

We would clarify the last statement by explaining that, if the violation is likely to recur, removal *may be* appropriate, depending on the totality of the circumstances.

Although we do have some concerns about the Judge's future conduct, his past conduct does not affirmatively establish that he is not competent to be a judge. Nor has his integrity been directly called into question in this case. We conclude that his removal from office is not an appropriate sanction in this case.

On the other hand, neither is censure an appropriate sanction. Censure may be appropriate in a particular case for extra-judicial conduct that violates the Code, but which is not directly related to the judge's performance in office. *In re Roth*, 293 Or 179, 189, 645 P2d 1064 (1982) (censure for conduct that amounted to criminal mischief in the third degree and a wilful violation of Canon 2A). It also may be an appropriate sanction, even for a significant violation of the Code as it relates to judicial conduct *per se*, where the corduct was public and where the court has "no reason to think that the incidents will be repeated or that the Accused requires any greater sanction than the publication of this opinion and the publicity attendant to this proceeding." *In re Fadeley, supra*, 310 Or at 573 (censure of a sitting judge for

violations of the Code's prohibition on fundraising conducted while a candidate for the office).

The case that comes closest factually to the case now before us is *In re Gustafson, supra.* In that case, a new district court judge was charged with various complaints relating to his handling of criminal cases. The Commission found violations in 13 cases. *In re Gustafson, supra,* 305 Or at 657. On review, the judge acknowledged that his behavior in each instance was improper, but contested whether it was "wilful." *Id.* at 663. This court found the following wilful violations of the Code: (1) in three cases, the judge interfered with the female public defender's relationship with her clients in situations where the judge's negative personal feelings about the lawyer entered into his rulings in the cases; (2) in two cases, including one involving the same public defender, the judge acted in court in a manner that was impatient, discourteous, and rude to counsel; and (3) in one case, contrary to law, the judge changed a sentence imposed by a visiting judge, without determining whether he had the authority to do so. *Id.* at 664-69. With respect to the proper sanction, the court held:

> "In sum, we find that Judge Gustafson's conduct repeatedly fell short of the governing standards of judicial conduct and that it was 'wilful' within the meaning of Article VII, (Amended), section 8(1)(b) and (e) in those instances identified above.
>
> "As to the sanction, the judge's brief in this court paints the picture of 'an inexperienced judge in a new court who had not yet learned to exercise authority expertly' and argues that 'ability to deal dispassionately with disagreeable conduct and events' is something that must be learned. We acknowledge the point * * *. Although Judge Gustafson was slow to recognize that his conduct in office fell short of judicial standards, it appears that he has undertaken steps to

learn from his unfortunate start. We see no need for, or useful purpose to be served by, a suspension.

"Accordingly, the foregoing opinion will serve as a judgment of censure of Judge Gustafson's conduct." *Id* at 669-70.

In contrast, in this case, the Judge's positions have borne few signs that he views the future in a manner materially different from the past. There are important lessons to be learned from this case, and we are convinced that a suspension of the Judge without pay is the only way to ensure that he will learn those lessons. We also are convinced that a suspension is necessary to maintain public confidence in the integrity and impartiality of the judiciary that demands adherence to the standards of conduct it has set for itself and for the fair administration of justice.

The accused is suspended from office without pay for a period of 45 days, commencing on the effective date of this decision.

APPENDIX

Wallowa County Chieftain
Letter to the Editor
September 17, 1992

"I was more than a little disturbed by the article entitled 'Schenck disqualified from abuse case.'

"The reporting of the disqualification was fine. The disturbing part was linking the reason for the disqualification with the Lewis case in Union County and completely misrepresenting the facts of the Lewis case and my actions in it.

"This linking and misrepresentation gave the impression that I am in some way sympathetic to child molesters. Anyone who knows me even slightly, knows that is a completely and totally false impression.

"For the past decade there has been more than a little hysteria connected with the handling by law enforcement and the courts of allegations of child sexual abuse.

"I will not run a court that is driven by hysteria or political pressure of any kind in any type of case.

"The use and abuse of a child in any manner for adult sexual gratification is abominable. Child sexual abuse or even just physical abuse almost universally raises in normal people strong passions and demands for severe consequence to the perpetrator.

"In most of the cases, the perpetrator admits or there is strong evidence and guilt is fairly easily established.

"However, there are those cases where allegations are made and for varying reasons, nothing is very clear.

"Sometimes it is a proof problem where there are no eyewitnesses except the child victim and the perpetrator, and very little

or no physical evidence --or the physical evidence is not clearly tied to the abuse — could be caused by some other trauma, physical or mental, etc.

"Sometimes the motive of the person reporting is challenged, such as in child custody cases where one parent accuses the other, or where teenagers have a history of discipline problems with the parent and the child is accusing the parent.

"There are also problems of time passing between the alleged abuse and the reporting, especially where very young children are the victims. Quite often they do not report until later in life. This raises memory and perception problems.

"The methods and procedures used by those investigating the allegations are critical in cases where the child victim's testimony is critical — especially a very young child.

"The investigative interview must be conducted without any hint of leading or suggestive questions or information being fed the child. Law enforcement and child protective personnel have, over the last decade, made significant strides in this area but more is being learned every day.

"Children, like adults, sometimes misperceive and some are suggestible.

"Once an allegation of child sex abuse is made, the consequences are devastating and irretrievable. Adults are destroyed; children are destroyed; whole families are destroyed.

"Where there are significant problems with a child sex abuse case, it becomes a prosecutor's worst nightmare. If they prosecute and lose, they have not only not brought a perpetrator to justice and thereby accomplish some measure of protection of the victim and the public, but they have further traumatized the victim and the victim's family and possibly destroyed the life of the alleged perpetrator.

"If they do not prosecute, they stand to be vilified by the persons bringing the charge and by the media.

"Courts do not have as difficult a job as prosecutors in those cases, but there is almost unanimous agreement amongst judges across the nation that contested child sex abuse cases are the most difficult cases which courts are called upon to handle — especially the pre-trial proceedings and sentencing. Usually a jury takes the burden of deciding guilty or not guilty.

"The court is faced with the first difficult decision when release pending trial is an issue.

"The law is clear that a defendant has the right to release pending trial (except in cases of murder where there is clear and convincing reason to believe the defendant is guilty) upon posting reasonable bail or on the defendant's own recognizance if there is no reason to believe that the defendant will fail to appear and answer to the charges.

"The court may, on a bail release or an O.R. release, set reasonable conditions to assure the defendant's appearance.

"The court cannot set conditions that are in fact, or in effect, punishment for the alleged crime. All defendants are under our constitution, presumed innocent until proven guilty.

"If there are facts that lead the court to believe that the defendant presents a danger to the public or the victims, etc., the court can set conditions on the activities of the defendant pending trial.

"In Oregon, the leading case is *Sexson v. Merten*, 291 Or 441, [631 P2d 1367 (1981),] which held that a defendant accused of DUII who had a clear alcohol addiction problem and a record of convictions for alcohol related offenses could be required, pending trial, to abstain from the use of alcohol and be required to report to a custody officer, etc.

"So, in child sex abuse cases where there is a factual background to indicate that the defendant is a danger to his alleged victims or to other potential victims, the court can require that the defendant not contact directly or indirectly the victim or the victim's family or place himself in circumstances where the defendant might have opportunity to victimize other children.

"This usually means that the defendant will be required to have some neutral, responsible adult around if children are present.

"The conditions of release must be reasonable and based on facts. In most cases, other than child sex abuse cases, conditions are pretty standard and easily set. But in child sex abuse cases, the old paranoia and hysteria still enters. If the court tries to be reasonable and base a release decision on the facts of the particular case, accusations of being soft on child sex abusers are raised. Statistics are cited as to the probability that child sex abusers will re-offend; that abusers of females often also abuse males, etc., etc.

"The problem is that the court is not dealing with a statistic, but with a human being who is entitled to the protection of the constitution and the law until proven guilty.

"At this early stage, the court really knows very little about the evidence against the defendant.

"The prosecutors want to absolve themselves of any blame if the defendant re-offends pending trial, so they often demand conditions they know are not proper, or at least are stretching the boundaries of the law. The prosecutor also has the benefit of being aware of all of the evidence.

"The principle [*sic*] condition demanded is that the defendant not have a contact with children under age 18.

"This includes attending church where children are present, going to school functions, or entering McDonalds, etc.

"Applied to every case I do not believe this to be a proper condition, and it is almost impossible to administer.

"Conditions are also demanded to prevent an accused parent from having any contact with one or more of their own children who they are not accused of abusing and who are not witnesses. This automatically totally splits up families --sometimes for years — before there is a trial.

"These are difficult problems, not [*sic*] be avoided by a Pavlov's dog type response to every case — which is what some judges do to avoid making tough decisions and to avoid criticism. There should be no such thing as standard release conditions or release conditions based on a standard 'policy' in these cases.

"All standard release conditions are established for is to protect the prosecutor and the judge from criticism. However, the prosecutor can always point at the judge and that is how it should be. The judge makes the decision and the buck stops with the judge.

"The conditions I set in the Vaughan case were tough and reasonable. All Ms. Grote [*sic*] had to was say [*sic*] she demanded even tougher conditions and place the blame on me. Unfortunately her immaturity led her to view herself as the knight on the white charger and to set herself up as all knowing and righteous in her own position. Therefore, I am the devil to be avoided at all costs.

"If Ms. Grote [*sic*] maintains her position, the county will not have the services of the Circuit Judge elected by the voters of this county to hear felony criminal cases. Instead, Eric Valentine or a visiting judge will handle the Circuit Court criminal jurisdiction and the county will be served by a district attorney who had

demonstrated a total lack of present ability, experience and maturity to handle the job of the District Attorney. I will expand on the latter with specifics in another report.

"R. D. Schenck
"Circuit Judge
"District 10"

Wallowa County Chieftain
Guest editorial
October 1, 1992

"A judge's evaluation of the district attorney

"This is a report on my observations and evaluation of the performance of Mary Goebel as District Attorney for Wallowa County.

"This is not something I would do in the ordinary course. However, Ms. Goebel's recent decision to disqualify me in every case she files leaves me with no alternative.

"In my letter to you regarding the disqualification issue dated August 31, 1992, I stated that I would set forth specifics upon which I based my opinion that Ms. Goebel does not have the capability, experience or maturity to handle the duties of District Attorney. I do that now.

"Since we both took office at the same time, I have worked with Ms. Goebel during the entire period of her performance in office.

"She had not won one felony jury trial.

"She still does not have a grasp of how to present a witness.

"She does not as yet have the ability to differentiate between what evidence should be presented in the State's case in chief as opposed to rebuttal.

"She does not understand the purpose of expert testimony in sex abuse cases or how to lay the proper foundation to get it admitted.

"In one sex abuse case, she had to dismiss the case three times and take the indictment back to the grand jury the fourth time before she got it right. That case has been delayed for trial for over a year because she simply did not know how to get it prepared for trial.

"She dismissed a felony sex abuse case based on an experienced defense attorney's assertion that the statute of limitation had ran [*sic*] out when in fact it had not.

"The District Attorney always prepares the Sentence Order and Judgment. I have had to revise every sentence order she has presented to me. Some were seriously defective.

"In two major felony cases, I have had to reject plea bargains which she agreed to. In both cases, she would have permitted the defendant to be sentenced to optional probation for serious felony crimes — one for dealing in controlled substances and having 90 pounds of marijuana in possession, and another for assault on his wife which almost killed her. I ended up sentencing both to maximum terms in state prison.

"In the first nine months or so she was consistently late to court. I finally had to reprimand her in open court.

"If you speak to her critically, even in a positive vein, she cries.

"She has no comprehension of what a case (work) load is. She spoke to me about applying to the County for inclusion in her budget of money to hire a deputy to help her.

"The fact of the matter is that she has a workload (caseload) which is not more than 20 percent and probably closer to 10 percent of the caseload carried by the attorneys in the District

Attorney's office in La Grande. There are three attorneys in La Grande, and over 200 felony cases were filed in 1991. Ms. Goebel filed eight felony cases in Wallowa County in 1991. The same percentages would hold for District Court.

"Ms. Goebel, straight out of law school is being paid around $50,000 per year with benefits above that of $10,000 per year.

"She should be able to do the county's civil work for nothing and still have less than a 50 percent workload. She resigned from doing the civil work even though she was getting paid.

"She accuses me of being biased against the State. The problem is really the opposite for me as judge. The real problem I face with Ms. Goebel representing the State is how do I insure [*sic*] that the State gets a fair trial? How do I insure [*sic*] that the people of Wallowa County have their case against the criminal defendant properly and competently presented — when it is obvious that the people's prosecutor often does not have a clue as to how to proceed?

"The judge's hands are tied for the most part. The judge must maintain impartiality, especially in criminal trials and cannot help either side present their case.

"I could go on, but I think you have the picture by now.

"Putting an attorney right out of law school into the courtroom trying felony jury cases is like putting a medical student fresh out of medical school into the operating room to do complex surgery.

"Unfortunately, Ms. Goebel is the sole attorney in the Wallowa County District Attorney's office. She had no one to guide her on a daily basis. Her case load is not sufficient for her to gain experience rapidly.

"I spent several years going to court with an experienced attorney, as his assistant, before I tried a case.

"Ms. Goebel is a lovely young lady. But she has placed herself in a position for which she has neither the training or experience to perform the duties competently.

"Unfortunately, in this instance, it is the public that will get the short end of the stick. It may also be that Ms. Goebel will be seriously damaged in her career. She has a lot of potential if she was in a position where she could be properly trained.

"The position of the District Attorney in Wallowa County has had its problems for as long as I can remember. No energetic, experienced, young career-minded attorney wants to take the job because it really offers little challenge and little opportunity for advancement. So the county has been saddled with older attorneys who were in fact not all that energetic or younger attorneys who were not all that experienced.

"Perhaps the county court needs to investigate what alternatives might be available to ensure the county has a vigorous, competent prosecutor.

"*Editor's note: Ronald D. Schenck is the Circuit Court Judge for Union and Wallowa counties.*"

UNIS, J., specially concurring in part, dissenting in part.

I agree with the court's holdings that Judge Schenck (the Judge) violated Canons 2A, 3A(4), 3A(6), and 3C(1) of the Code of Judicial Conduct (Code). I do not, however, concur in several aspects of the court's analysis in reaching those holdings. I also agree with the court's holdings that the Judge did not violate the Code in the *Hopkins* cases. I agree with the sanction imposed by the court. I dissent, however, with respect to the court's holding that the Judge may be disciplined under Canon 1. I write separately to express my concerns about the court's analysis regarding Canons 1, 2A, and 3A(6).

CANON 1

In my view, there is no plausible basis for the court's holdings that discipline the Judge for violating Canon 1. Canon 1 provides:

> "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

Canon 1 is *not* a rule of conduct under which a judge may be disciplined. Rather, Canon 1 is the basic philosophical provision of the Code, and its terms have an important bearing on all the other canons. Canon 1 performs two functions. First, Canon 1 espouses the ultimate objective of the preservation of "the integrity and independence of the judiciary," which is "indispensable to justice in our society." Second, Canon 1 is a guide to be used in interpreting the other canons in the Code. Thus, Canon

1 may not be used as the basis of a complaint in a judicial disciplinary proceeding.

CANON 2A

I am troubled by the court's lack of analysis and discussion regarding the application of Canon 2A to the Judge's conduct in this case. The court's opinion fails to provide any guidance as to either the scope of the standard set forth in Canon 2A or when that canon may be used as an independent basis for disciplining a judge.

Canon 2A provides:

> "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 2A is cast in broad and general terms. By necessary implication, under Canon 2A a judge should avoid both professional and personal conduct that creates actual impropriety or the appearance of impropriety. It would be difficult, if not impossible, to list specifically all acts or conduct of a judge that may impair "public confidence in the integrity and impartiality of the judiciary." In my view, actual impropriety under the standard set forth in Canon 2A would include violations of law, court rules or other specific prohibitory provisions of the Code. Thus, any violation of a specific prohibitory provision of the Code arguably would be a violation of Canon 2A.

It might well be subject to question, however, whether a judge may be independently disciplined under Canon 2A when his or her impropriety is found to violate a specific rule of conduct in the Code. A judge may be disciplined under Canon 2A, however,

for conduct that diminishes public confidence in the judiciary that is not specifically mentioned in the Code. [1]

Under the court's opinion, it is unclear whether the Judge is being disciplined independently under Canon 2A of the Code. I agree with the court's finding that, in essence, the conduct of the Judge impaired public confidence in the integrity and impartiality of the judiciary and, therefore, violated Canon 2A. As previously stated, I agree with the sanction imposed by the court. In arriving at what I consider to be the appropriate sanction, however, I did not consider the Judge's violations of Canon 2A because the Judge is being disciplined for that conduct under other specific prohibitory provisions in the Code.

CANON 3A (6)

I agree with the court's holding that disciplines the Judge under Canon 3A(6) for his letter to the editor and guest editorial that were published in the *Wallowa County Chieftain* (*Chieftain*). Despite the Judge's constitutional challenges, I agree with the court that the Judge may be disciplined for making those public statements. I cannot, however, join in the court's analysis in reaching that holding.

Canon 3A (6) provides:

> "A judge should abstain from public comment about pending or impending proceedings in any court and should

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[1] I have reservations as to whether the standard expressed in Canon 2A could serve as the basis for discipline for conduct not otherwise proscribed by the Code without further interpretation of that standard. *See In re Ainsworth*, 289 Or 479, 493, 614 P2d 1127 (1980) (the validity of a canon, which provided that " [a] lawyer should avoid even the appearance of professional impropriety" as the basis of a complaint in a disciplinary proceeding, might well be subject to question); *Megdal v. Board of Dental Examiners*, 288 Or 293, 605 P2d 273 (1980) (discussing whether the term "unprofessional conduct" provides an adequate standard for basis of professional discipline). The resolution of that issue is not necessary in this case.

> require similar abstention on the part of court This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court."

Any instance of judicial discipline under Canon 3A(6) raises important questions under the free-speech guarantees of Article I, section 8, of the Oregon Constitution and the First Amendment to the federal constitution.[2] With regard to Article I, section 8, this court has stated that "[u]nquestionably any rule that in terms directs persons not to make particular kinds of statements is difficult to square with constitutional guarantees of freedom of expression, particularly those of the Oregon Constitution." *In re Lasswell*, 296 Or 121, 124, 673 P2d 855 (1983).

In *In re Fadeley*, 310 Or 548, 560-61, 802 P2d 31 (1990), this court held, over my dissent, *id.* at 591-98 (Unis, J., concurring in part, dissenting in part), that the right of a judge to speak, write, or print freely is subordinate to any rule of judicial conduct that has been or may be adopted by this court. Today, although the court chooses not to decide this case under that part of the *Fadeley* decision, the court seems to reaffirm that part of the *Fadeley* decision, __ Or at __ (slip op at 37). For the reasons stated in my separate opinion in *In re Fadeley*, *supra*, 310 Or at 591-98 (Unis, J., concurring in part, dissenting in part), I continue to believe that that holding in *In re Fadeley* is wrong. *See*

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[2] Article I, section 8, of the Oregon Constitution provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatsoever; but every person shall be responsible for the abuse of this right."

The First Amendment to the Constitution of the United States provides in part:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

also Armstrong, *Free Speech Fundamentalism—Justice Linde's Lasting Legacy*, 70 Or L Rev 855, 887-88 (1991) (criticizing that aspect of the *Fadeley* decision).[3]

The court holds that "even an application of 'traditional' Article I, section 8, principles to this case" yields the result that "the Judge's actions in causing the publication of the letter and the editorial posed a serious and imminent threat to the public confidence in the integrity and impartiality of the judiciary in general and of the Judge himself in particular." Or at (slip op at 38-39). The court states:

> "[T]he Judge's actions were a direct comment on the quality of prosecution to be expected in pending and impending criminal matters that were to come before him in Wallowa County. Such wilful violations of Canon 3A(6) similarly created a serious and imminent threat to the public's confidence in the integrity and impartiality of the judiciary — the value that the Canons manifestly are intended to protect. Under *In re Lasswell, supra*, imposition of a sanction on an elected public official in such circumstances does not violate that person's rights under Article I, section 8, of the Oregon Constitution. We now hold in this case that the imposition of discipline under Canons 1, 2A and 3A(6) does not violate Article I, section 8, of the Oregon Constitution." __ Or at __ (slip op at 39).

The court apparently finds Canon 3A(6) constitutional by "balancing" the "regulatory interest with the individual's interest" in free expression. __ Or at __ (slip op at 38). The court misreads

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[3] I am hopeful that, when all seven permanent members of this court are asked to reconsider that part of *In re Fadeley*, 310 Or 548, 560-61, 802 P2d 31 (1990), we will jettison it. In this case, four members of this court recused themselves from sitting on this case. Two of the five members of the court in this opinion are members of the Court of Appeals, sitting as Justices *pro tempore*.

Lasswell and misunderstands the historically-based "incompatibility exception."

The *Lasswell* decision

> "did not involve a contemporary 'balance' between competing constitutional rights, and was not based on a determination that the restriction imposed a 'minimal' burden on the district attorney's right to speak. Instead, it involved a historically based exception for restrictions on expression by public employees to the extent the expression is incompatible with their public function.
>
> "* * * * *
>
> "Under [*State v. Robertson*, 293 Or 402, 649 P2d 569 (1982)], the validity of these restrictions does not turn on whether the right of the employees to free expression is outweighed by the public interest served by the restrictions. That is, it does not turn on whether an appropriate balance has been struck between these 'competing' interests. It turns, instead, on whether the restrictions are based on a historically recognized exception for public employees that it is incompatible with their public function, and on whether the restrictions are wholly confined within this exception." Armstrong, *supra*, 70 Or L Rev at 890-91 (footnotes omitted).

As I explained in *In re Fadeley*, *supra*, 310 Or at 582 (Unis, J., concurring in part, dissenting in part):

> "The incompatibility between the particular privileged speech and the performance of one's special role or function need not be spelled out in the text of the enactment, but it must be shown by the government to be a 'highly likely' effect. Incompatibility, which is always related to state action, is *assessed at the time the individual chooses what to speak or write*. It is not simply assumed at the time of the

> enactment of the governmental provision. Incompatibility cannot, in other words, be legislated in the abstract or by a generalized finding; it must be shown to be a 'highly likely' effect in a concrete case. 'Our cases under Article I, section 8, preclude using apprehension of unproven effects as a cover for suppression of undesired expression * * *.' *City of Portland v. Tidyman*, [306 Or 174, 188, 759 P2d 242 (1988)]. A mere likelihood of incompatibility will not, therefore, suffice." (Emphasis in original; some citations omitted.)

In *In re Lasswell*, *supra*, this court articulated the "incompatibility exception" under Article I, section 8. In *Lasswell*, this court recognized that speech that could not constitutionally be prohibited outright may nevertheless, under narrowly-defined circumstances, be found incompatible with the performance of one's special role or function. In *Lasswell*, this court held that a lawyer disciplinary rule could constitutionally restrict *prosecutors* from commenting publicly on pending cases with which they are associated *if the rule was narrowly limited to actual incompatibility between the speech and the prosecutor's official function*, including his responsibility to preserve the person's right to a fair trial by an impartial jury.

Article I, section 8, of the Oregon Constitution would preclude the enactment of an outright prohibition against public comment by persons *generally* or against publication by those to whom such comment is made. *See In re Lasswell*, *supra*, 296 Or at 124 (citing cases). Canon 3A(6) is, however, directed at judges, not at persons generally. The point of Canon 3A(6) is not restraint of free expression by judges because they are judges. In my view, a canon that requires a person who becomes a judge to surrender all speech rights guaranteed by Article I, section 8, of the Oregon Constitution could not survive a challenge under that constitutional provision. *In re Fadeley*, *supra*, 310 Or at 590 (Unis, J., concurring in part, dissenting in part). *See In re*

Richmond, 285 Or 469, 474-75, 591 P2d 728 (1979) (same principle stated for lawyers). Rather, Canon 3A(6) addresses the incompatibility between a judge's official function, including his or her responsibility to promote public confidence in the impartiality and integrity of the judiciary, and speech that, though privileged against other professional sanctions, vitiates the proper performance of that function under the circumstances of the specific case. In short, a judge is not denied freedom of expression or freedom to speak, write, or publish; but when a judge exercises official responsibility in the performance of the judicial office, he or she also undertakes the professional responsibility to act in a manner compatible with the judicial office in what he or she says or writes.

Canon 3A(6) survives the Judge's constitutional challenge *if it is narrowly construed so as to limit its coverage*, in the words of Article I, section 8, to a judge's "abuse" of the right "to speak, write, or print freely on any subject whatever." *In re Lasswell*, *supra*. Thus, the Judge may be disciplined under Canon 3A(6) only if a "highly likely" effect of the Judge's public statements was actual harm to public confidence in the impartiality and integrity of the judiciary.

I am satisfied by clear and convincing evidence that some of the Judge's statements that were published in the *Chieftain*, viewed in context, were statements about pending or impending cases and that actual harm to public confidence in the impartiality and integrity of the judiciary was a "highly likely" effect of those statements.

I agree with the court's holding regarding the Judge's arguments under the First and Fourteenth Amendments, although my analysis of those issues would be somewhat different. *See Shockey v. City of Portland*, 313 Or 414, 435-441, 837 P2d 505 (1992) (Unis, J., concurring in part, dissenting in part) (setting forth analytical framework for determining whether public employee speech is constitutionally protected under the First Amendment).

APPENDIX D

RECEIVED MAY 3, 1993

BEFORE THE COMMISSION ON
JUDICIAL FITNESS AND DISABILITY

STATE OF OREGON

INQUIRY CONCERNING A JUDGE

RE: THE HONORABLE RONALD D. SCHENCK

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION

I.

SUMMARY OF PROCEEDINGS

This inquiry arises out of a complaint concerning the conduct of the Honorable Ronald Schenck, a Judge of the Circuit Court of the State of Oregon for Union and Wallowa Counties (District 10). The Commission has jurisdiction in this matter pursuant to ORS 1.410-1.480, Article VII (Amended), Section 8(1), of the Oregon Constitution, and the Oregon Code of Judicial Conduct.

The Commission Complaint was filed on September 21, 1992. An Amended Complaint was filed on October 20, 1992. An Answer and Affirmative Defense to the Amended Complaint was filed with the Commission within the time period allowed by the Commission. The Complaint was amended again immediately prior to the public hearing to add two new allegations.

The major allegations in the Complaint can be categorized into three type of charges:

1. Judge Schenck willfully violated Canons 1, 2A and 3C(1) when he refused to disqualify himself in proceedings in which his impartiality might reasonably be questioned.

2. Judge Schenck willfully violated Canons 1, 2A, 3A and 3B(1) by failing to facilitate the performance of the administrative responsibility of other judges and court officials and by failing to be patient, dignified and courteous in his dealing with the presiding judge.

3. Judge Schenck violated Canons 1, 2 and 3A when he initiated ex parte communications concerning proceedings pending in his jurisdiction and made public statements concerning the district attorney for Wallowa County and concerning pending cases.

A hearing Memorandum was filed by Judge Schenck's attorney prior to hearing.

A public hearing was held in LaGrande, Oregon, on February 24, 25 and 26, 1993. Commission members in attendance at the hearing were Judge Jon Lund, Judge Linda Bergman, Judge Barbara Haslinger, Charles Davis, Richard Page, Agnes Petersen, and Richard Kropp. Robert Joseph was recused. Commissioner Kropp presided at the hearing. At the time of the hearing, the Commission had one vacancy in a public position. The record was left open until March 31, 1993, to prove an opportunity to Judge Schenck to provide additional evidence on two allegations added just prior to the hearing.

The following witnesses were called to testify at the hearing:

On Behalf of the Commission

Mary Alice Goebel
District Attorney, Wallowa County

Russell West
District Attorney, Union County

Janet Pryca
Legal Assistant to Attorney Wade Bettis

On Behalf of Judge Schenck

Michael D. Reynolds
Asst. Attorney General

Ronald D. Schenck
Circuit Court Judge

Wallace P. Carson, Jr.
Chief Justice, Supreme Court

Steven Lubet
Professor of Law

Stephen Riedlinger
Attorney

Michelle Leonard
Union County Court Clerk

Willard K. Carey
Attorney

On April 17, 1993, the Commission met to consider and adopt the Findings of Fact and Conclusions of Law contained herein. The Commission's unanimous recommendation, based upon the findings of fact and conclusions of law, is that Judge Schenck should be suspended for three months without pay.

II.

APPLICABLE LAW

Article VII (Amended), Section 8, establishes the constitutional framework for the removal, suspension or censure of judges. This section states that, in a manner provided by law, a judge may be removed or suspended from judicial office by the Supreme Court or censured by the Supreme Court for:

> ". . . (e) Wilful violation of any rule of judicial conduct as shall be established by the Supreme Court; . . ."

Consistent with Section 8(1)(e), the Supreme Court has adopted the Oregon Code of Judicial Conduct. The Code was originally adopted by the Supreme Court on March 11, 1975, and was in effect during all times material to these proceedings. The specific provisions of the Code which the Commission relies upon in this proceeding are as follows: Canons 1, 2A, 3A(3), 3A(4), 3A(6), 3B(1), and 3C(1).

The Commission defines "willful conduct" within the meaning of Article VII, Section 8, to be conduct where (1) the judge intends to cause a result or take an action contrary to the applicable rule; and (2) the judge is aware of circumstances that, in fact, make the rule applicable, whether or not the judge knows he violates the rule. *In re Gustafson,* 305 OR 655, 660 (1988).

The standard of proof required to establish a willful violation is clear and convincing evidence. *In re Fields,* 281 OR 623, 629 (1978).

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Basic Findings

1. The Honorable Ronald Schenck is a judge of the Circuit Court of the State of Oregon for Union and Wallowa Counties. He was elected in 1990 to a six-year term beginning in January, 1991.

2. The Commission has jurisdiction in this matter pursuant to ORS 1.410 and 1.480, Article VII (Amended), Section 8(1) of the Oregon Constitution, and the Oregon Code of Judicial Conduct.

3. In accordance with the requirements of law and of the Commission's Rules, Judge Schenck was given a reasonable notice of the charges against him and was afforded the opportu-

nity to be present at the hearing and to present evidence to refute the allegations contained in the Commission's Complaint.

B. Findings and Conclusions of Law: Disqualification (Complaint Paragraph 4).

Findings

4. In 1989, Karen Hopkins pleaded guilty to charges of sexual abuse of her two children. She was placed on supervised probation with several special conditions. Ms. Hopkins' children were placed in the temporary custody of Children's Services Division (CSD).

5. In April, 1991, Karen Hopkins was charged with violating a term of her probation that required here to participate in a treatment program for sexual offenders. Judge Schenck presided over a hearing on the alleged violation and, on September 18, 1991, issued a written opinion. In the opinion, Judge Schenck found that defendant had not willfully violated the term of her probation. The opinion also stated:

> "The Court is convinced that insofar as her children are concerned, this young woman, will not, in the foreseeable future, be able to participate in their lives, or to have any relationship with them whatsoever. . . . CSD should move to develop a permenent (sic.) plan for the placement of the defendant's children, which does not include contact with the defendant. Termination of parental rights should be pursued."

6. On October 25, 1991, Ms. Hopkins received notice that a hearing was being scheduled for November 6, 1991, before Judge Schenck on her children's juvenile proceedings. On the same day, Ms. Hopkins, through her attorney Bruce Anderson, filed a motion to disqualify Judge Schenck in the two cases involving her children (Cases No. 88-10-2734, 2735).

7. Judge Schenck denied the motion as "not timely". He based his denial upon the requirements of ORS 14.250, *et seq.*

8. In a meeting with Judge Schenck on October 28, 1991, and in a subsequent letter to Judge Schenck dated October 29, 1991, Bruce Anderson asserted actual bias as a basis for disqualification and further asserted that Judge Schenck's disqualification was required by the Canons of Judicial Conduct.

9. On October 29, 1991, attorney Bruce Anderson filed a complaint with the Commission on Judicial Fitness. The complaint alleged that Judge Schenck violated the Code of Judicial Conduct when he refused to disqualify himself from hearing the juvenile proceedings. A copy of the complaint was provided to Judge Schenck.

10. On October 30, 1991, Judge Schenck and attorney Anderson had a telephone conversation regarding the *Hopkins* matter. Judge Schenck stated: "Who in the hell had anointed him as God's gift to the legal profession?" (Exhibit U, page 11).

11. Judge Schenck refused to postpone the juvenile proceeding, which was held as scheduled on November 6, 1991. Only a representative of CSD appeared. In the hearing, Judge Schenck stated:

> "I would have liked to have heard it today and — resolve this problem because obviously I know a lot about this family and I do not feel that I am prejudiced in any manner or biased in any manner by reason of my knowledge. It just is a fact that I have knowledge about the family. . . .
>
> "Well, and I — I can say on the record for your — for your benefit that the Court is aware of — of substantial good reasons for these children to continue in the care and custody of Children's Services Division. At least that is the Court's knowledge at this time until something else is presented that would change my mind. As so you have —

in fact have my concurrence and my backing to continue with the program and we'll try to get it formally heard and formally adjudicated as quickly as possible."

12. On November 8, 1991, Judge Schenck wrote to members of the Union and Wallowa County Bar Associations. Enclosed with the letter was a copy of the complaint filed by Bruce Anderson with the Commission on Judicial Fitness and Disability on October 29, 1991. Judge Schenck states in his letter that the complaint by Mr. Anderson is "pathetic" and a "petulant response" to the Judge's handling of cases.

13. On November 25, 1991, Bruce Anderson filed a petition on behalf of Ms. Hopkins for a writ of mandamus, seeking to require Judge Schenck to vacate his October 25, 1991, order denying her motion to disqualify him, as well as to require Judge Schenck to recuse himself or set a hearing before a different judge on the question of whether Judge Schenck should be disqualified in the juvenile cases. On July 9, 1992, the Supreme Court issued a preemptory writ requiring Judge Schenck to recuse himself from the juvenile cases.

14. On November 27, 1991, attorney Bruce Anderson filed a motion to disqualify Judge Schenck in the case of *Roper and Roper* (Case No. 90-08-33607). The motion cited the Code of Judicial Conduct, Canon 3C(1). Judge Schenck denied the motion as "not timely" under ORS 14.210. On December 31, 1991, attorney Bruce Anderson filed a motion to disqualify Judge Schenck in the case of *Kiemnec and Kiemnec* (Case No. 91-04-34114). The motion cited the Code of Judicial Conduct, Canon 3C(1). Judge Schenck denied the motion as "not timely".

15. On February 21, 1992, Judge Schenck wrote to Bruce Anderson and three other attorneys regarding three cases then pending before the court. In the letter, Judge Schenck states his position that:

> "If the time has passed for filing a motion to disqualify, the attorney who feels that the judge is prejudiced against him must step aside and see that his clients get representation by counsel who can in fact work with the judge before whom the case is pending."

The letter goes on to state:

> "I will not, therefore, grant the motions to disqualify. However, due to the unabated animosity and unabated misrepresentations being made by Mr. Anderson against me as judge through affidavits and letters, it is apparent to me that Mr. Anderson and I cannot work together and may never be able to. Further, since I believe Mr. Anderson has, in all of this barrage of paperwork violated a number of the disciplinary rules, I have come to the conclusion that I have no choice but to file charges against him with the Oregon State Bar Disciplinary Committee."

16. On February 21, 1992, Judge Schenck filed a complaint regarding the conduct of attorney Bruce Anderson with the Oregon State Bar. The complaint accuses Mr. Anderson of making false statements to the Commission on Judicial Fitness and Disability, false statements in his memorandum of law filed with the mandamus proceeding in the *Hopkins* matter, and false statements in a motion for change of venue in *Rose and Rose,* Union County Case No. 91-07-34286. The letter also states that Mr. Anderson is "engaged in an all-out vendetta to discredit me as a judge". . . . "It is Mr. Anderson's conduct that has become and is prejudicial to the administration of justice in the Circuit Court in District 10"... . "Mr. Anderson's continued attack on my work habits is infuriating . . . that accusation's a flat lie". . . . "His purpose seems obvious to me and that is to destroy me at any cost". . . . "Mr. Anderson is obviously not mature enough to participate in a frank discussion" (Exhibit U).

17. On March 23, 1992, attorney Bruce Anderson filed a motion to disqualify Judge Schenck in the case of *Porter and Porter* (Case No. 91-01-33917). The affidavit in support of the motion cited Canon 3C, the letter of February 21, 1992, and complaints filed against Mr. Anderson by Judge Schenck with the Oregon State Bar on February 21, 1992, and March 6, 1992. Judge Schenck denied the motion as "not timely".

18. In a letter dated May 1, 1992, Judge Schenck wrote to Judge Eric Valentine regarding a dispute between Judge Valentine and Judge Schenck involving the operations of the Circuit Court. In the letter, Judge Schenck, referring to Bruce Anderson, states, "Are we going to let one little pompous, egotistical attorney run this court system?"

19. In June, 1992, Wallowa County District Attorney Mary Goebel filed a motion to disqualify Judge Schenck in the case of *State v. Vaughn* (Wallowa County Case No. 92-06-1423). Judge Schenck challenged the good faith of the affiant pursuant to the statutory procedures set forth in ORS 14.210 *et seq*. In an opinion dated August 4, 1992, Circuit Judge Frank Yraguen ordered that Judge Schenck be disqualified from the case.

20. On September 10, 1992, attorney Wade Bettis submitted a motion to disqualify Judge Schenck in the case of *State v. Dodson,* Union County Circuit Court Case No. 91-09-34409. Due to a clerk's error, the motion was not included in the file and was not presented to the judge.

21. On September 14, 1992, and again on September 16, 1992, the Court received letters from Mr. Dodson requesting a court hearing and a change of attorney. On September 16, 1992, Judge Schenck had the defendant brought to his courtroom. After discussing the matter with the defendant, Judge Schenck replaced Wade Bettis as the court appointed attorney for Mr. Dodson. Mr. Bettis was not present at the hearing. The deputy district attorney for Union County was present at the hearing.

Applicable Law

The Commission evaluates these facts against the Oregon Code of Judicial Conduct Canons 1, 2A and 3C(1).

Conclusion

Applying the requirements of the Code to the facts set forth above, the Commission concludes that there is clear and convincing evidence that Judge Schenck willfully violated the Code of Judicial Conduct when he failed to disqualify himself in *Hopkins, Roper, Kiemnec* and *Porter*. The Commission did not find clear and convincing evidence of a violation in *Dodson* and *Vaughn*.

Fairness in judicial proceedings is central to maintaining public confidence in our judicial system. Judges must be and appear impartial and unbiased at all times.

> "In our legal system it has always been recognized that judicial impartiality is a necessary element of justice. We expect our judges to be, above all else, impartial arbiters so that legal disputes are decided according to the law free from the influence of bias or prejudice. . . . Judicial impartiality is considered to be so important that even where a judge is in fact impartial but appears not to be, disqualification is required. Thus, we ask judges to faithfully maintain the appearance of impartiality as well as the reality of it."
>
> *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct,* 2nd Edition, American Judicature Society, Leslie W. Abramson, 1992, p. vii

Judge Schenck failed to recognize that the appearance of impartiality is as important as the reality of it. Canon 3C(1) requires a judge to decide in the first instance whether his or her impartiality might reasonably be questioned. The judge must focus on an objective assessment of the judge's situation, not a

subjective evaluation by the judge of how he or she feels about the case, the litigants or the lawyers. Judge Schenck's approach to disqualification completely ignored the requirements of the Code of Judicial Conduct and demonstrated a distinct lack of common sense. Judge Schenck's hyper-technical analysis of motions for disqualification failed to account for the appearance of bias created by his statements about a litigant in one case and an attorney in other cases.

Judge Schenck asserted that his only obligation when presented with a motion to disqualify was to evaluate that motion pursuant to the statutory procedure for disqualification. If the motion failed the statutory test, as far as Judge Schenck was concerned, the right to seek disqualification terminated. Whether or not the statutory right to seek disqualification terminates is not for the Commission to decide. Canon 3C applies to judges regardless of the rights or lack thereof created by ORS 14.210. Put another way, the fact that the provisions of ORS 14.210 are invoked to disqualify a judge does not relieve the judge of the obligation imposed by Canon 3C. Canon 3C is self-executing. No motion is required to trigger its application.

Because the facts were different in each of the cases, we discuss them individually.

Hopkins

In a September 18, 1991 written opinion following a hearing on Ms. Hopkins' violation charge, Judge Schenck stated that "CSD should move to develop a permenent (sic) plan for the placement of the defendant's children, which does not include contact with defendant. Termination of parental rights should be pursued." When Ms. Hopkins received notice that a hearing was scheduled in her children's juvenile proceedings before Judge Schenck, she moved to disqualify Judge Schenck in the two cases involving her children. Judge Schenck denied the motion as "not timely". A subsequent mandamus proceeding ultimately

reversed Judge Schenck's decision. The proceedings under the statutory disqualification procedure, however, are irrelevant to an analysis of Canon 3C obligations. In this case, Judge Schenck's impartiality was reasonably questioned. It is not unusual for judges to gain information about defendants or parties in a proceeding, only to find those defendants or litigants before them again in another proceeding. Judge Schenck's obligation to remove himself from the juvenile proceedings case was triggered not by his knowledge of Ms. Hopkins and her children, but by the fact that he had already decided, before the matter was formally presented to him, that her parental rights should be terminated. The issue in the juvenile's proceedings was the custody of the children. Judge Schenck's written opinion of September 18, 1991, was a clear statement of his position on the record with respect to that issue.

Judge Schenck's predetermination of the issues was confirmed by his comments during the November 6, 1991 hearing at which only a representative of CSD appeared. In that hearing, without the benefit of testimony on the subject, Judge Schenck stated that he was aware of "substantial good reasons for these children to continue in the care and custody of Children's Services Division". . . . "You have my concurrence and my backing to continue with the program and we'll try to get it formally hears and formally adjudicated as quickly as possible." It is clear from his comments in this hearing, as well as from his statements in the September 18, 1991 opinion, that Judge Schenck had made up his mind before the parties ever presented their cases. There is no clearer example of bias requiring recusal than predetermination of the outcome.

Roper and Kiemnec

Following Judge Schenck's decision not to recuse himself in the *Hopkins* case, attorney Bruce Anderson filed a complaint with the Commission on Judicial Fitness and Disability on

October 29, 1991, and provided a copy of the complaint to Judge Schenck. On October 30, 1991, Judge Schenck and attorney Anderson had a telephone conversation regarding the *Hopkins* matter, in which the Judge stated, "Who in the hell had anointed him as God's gift to the legal profession?" On November 8, 1991, Judge Schenck wrote to members of the Union and Wallowa Counties Bar Associations. Enclosed with the letter was a copy of the complaint filed by Bruce Anderson with the Commission on Judicial Fitness and Disability. In the letter, Judge Schenck stated that the complaint by Mr. Anderson was "pathetic" and a "petulant response" to the Judge's handling of cases. Bruce Anderson filed motions to disqualify Judge Schenck in the *Roper* case on November 27, 1991, and in the *Kiemnec* case on December 31, 1991.

The Commission does not believe that Canon 3C requires a judge to be disqualified merely because an attorney has filed a complaint against the judge with the Commission on Judicial Fitness and Disability. To do so would create an opportunity for attorneys to remove judges from cases even where there did not exist a reasonable basis for questioning impartiality. Similarly, the Commission does not believe that harsh words between a lawyer and a judge necessarily require recusal. However, where the judge takes affirmative action to make public the dispute between an attorney and himself, the balance tips heavily in favor of requiring recusal. The cumulative effect of the complaint filed with the Commission, the harsh words Judge Schenck had for attorney Anderson in their private conversation, and the Judge's affirmative effort to publicize both the complaint and his opinion of the complaint and of Mr. Anderson, was to create a reasonable basis for questioning Judge Schenck's impartiality.

Porter

When Bruce Anderson sought to disqualify Judge Schenck in the *Porter* case, Judge Schenck had intensified his critical

statements of attorney Anderson to the point where there was clear animus in the relationship. In two documents, both dated February 21, 1992, Judge Schenck makes highly critical comments regarding Bruce Anderson, including Judge Schenck's statement that Mr. Anderson has "engaged in an all-out vendetta to discredit me has a judge" and his belief that "due to the unabated animosity and unabated misrepresentations being made by Mr. Anderson against me as judge through affidavits and letters, it is apparent to me that Mr. Anderson and I cannot work together and may never be able to." Judge Schenck's feelings about Mr. Anderson had reached the point of being both personal and extreme. His recusal was clearly required by the standards of Canon 3C(1).

Vaughn

In *Vaughn*, the district attorney was successful in utilizing the statutory procedure to require Judge Schenck's disqualification, against Judge Schenck's opposition. Because Judge Schenck was, in fact, disqualified, the Commission did not consider whether a violation of Canon 3C(1) had occurred.

Dodson

In *Dodson*, no motion to disqualify was physically presented to Judge Schenck. Although the statutory motion is not necessary to trigger recusal under Canon 3C, there is not sufficient evidence in the record to establish that the Judge should have recused himself in every case in which Wade Bettis was an attorney.

* * *

The Commission received testimony from Judge Schenck and from Professor Steven Lubet on the subject of disruption to the court system that results from disqualifications, particularly in a small judicial district. Professor Lubet cited "disruption of the administration of justice" as one of the countervailing values that

a judge can consider in weighting the reasonableness of disqualification under Canon 3C. Professor Lubet was careful to say that a jurisdiction with a limited number of judges did not, in and of itself, create a basis for sitting on a case irrespective the appearance of impartiality.

There is no question that there is an impact on the judicial system in a small district when a judge recuses himself in a case. However, judicial "trades" in a rural district are very common. Moreover, the burden on judicial administration must be weighed against the burden on litigants if they are forced to try their cases before a judge who has exhibited bias towards them or their attorney. The Commission does not believe that a different standard should be applied to litigants in rural as compared to urban counties. The obligations of Canon 3C, and the duty to litigants to ensure a fair and impartial proceeding, should not be sacrificed to convenience.

C. Findings and Conclusions of Law: Administrative Responsibility (Complaint Paragraph 7).

Findings

22. In December, 1990, then Chief Justice Edwin Peterson appointed Judge Eric Valentine to be Presiding Judge of the Court System for Union and Wallowa Counties.

23. Chief Justice Peterson encouraged Judge Valentine to "take a strong role in the setting of all Circuit and District Court cases." (Exhibit 268.)

24. Judge Valentine, pursuant to his understanding of the role and authority of the Presiding Judge in Oregon's Court System, did assert his authority as Presiding Judge in the setting of all Circuit and District Court cases and on administrative matters, as well as ruling on motions for disqualification of Judge Schenck.

25. Judge Schenck vehemently disagrees with Judge Valentine's exercise of authority as Presiding Judge in the setting of cases and in ruling on Circuit Court motions.

26. On September 1, 1991, Justice Wallace Carson became Chief Justice and the administrative head of Oregon's Court System.

27. Chief Justice Carson testified that the Presiding Judge in Oregon's Court System does not have authority to assign cases in a court other than the judge's own court.

28. The conduct of business in District 10 courts has suffered from logistic and administrative deficiencies. The problem stems in part from the District and Circuit Courts being physically separated for a period of time from administrative personnel during remodeling of the Courthouse. Even under ordinary conditions, it appears that pleadings and files are frequently misplace. These matters were complicated by a turf war between Circuit and District Courts, as exemplified by Judge Schenck's 30-page handwritten letter (Exhibits 115 to 144).

29. Judge Schenck has been recused from approximately 20 percent of the Circuit Court civil cases in Union County.

Applicable Law

The Commission evaluates these facts against the Oregon Code of Judicial Conduct, Canons 1, 2A, 3A and 3B(1).

Conclusion

Applying the requirements of the Code to the facts set forth above, the Commission concludes that there is not clear and convincing evidence that Judge Schenck wilfully violated the Code of Judicial Conduct with respect to administrative responsibilities.

Prior to filing its Complaint, the Commission conducted a preliminary investigation into all the allegations against Judge

Schenck. The complaints received by the Commission and subsequent investigation yielded numerous examples of conduct which appeared to frustrate legitimate actions of the Presiding Judge and disrupt the operations of the Court System in District 10. Such conduct, if established by clear and convincing evidence, would be a violation of the Code.

The hearing in this matter worked as it should have. The Commission learned that there is substantial disagreement about the authority of a Presiding Judge. For example, former Chief Justice Edwin Peterson asserted that a presiding judge had authority to set cases in both Circuit and District Courts and strongly urged that this be done. Current Chief Justice Carson disagrees, stating that the Presiding Judge's role is limited to the management of court personnel and fiscal issues.

Although the tenor and style of Judge Schenck's communications with Judge Valentine and his predilection to publicly air his disagreements with Judge Valentine leave much to be desired, it is apparent that Judge Schenck resisted Judge Valentine's exercise of authority based upon a good faith belief that the Presiding Judge's role was very limited.

This conclusion will provide little comfort to the lawyers and litigants who must suffer the court disruption which is linked to this dispute. The impression left by all the testimony received by the Commission is that the Court System in District 10 is dysfunctional. Lawyers and staff have received conflicting direction from the Presiding Judge and Judge Schenck on docketing, presentation of motions and other procedural matters. Files and pleadings are frequently misplaced. Judge Schenck has told members of the local bar that the problems in the Court System are the result of Judge Valentine's approach to the Presiding Judge role.

While it is tempting to lay these problems at the feet of the two judges and court personnel, doing so would be neither fair nor

accurate. The problem in District 10 also stems from the failure of the leadership of the State's Court System to formalize policy regarding administrative consolidation of Circuit and District Courts and the role of the Presiding Judge. Until definitive direction is given, there will continue to be conflict and confusion in District 10 as well as elsewhere in the state. The confidence of Oregon's citizens in the statewide management of our judicial system is undermined by these unseemly bureaucratic battles. The Supreme Court or the Legislature should move quickly to resolve the conflicts.

D. Findings and Conclusions of Law: Ex Parte Communications (Complaint Paragraph 8).

Findings

30. *State v. Lawrence Vaughn* was a criminal proceeding involving child sex abuse, Wallowa County Circuit Court Cases No. 92-06-1423 and 1425.

31. On June 9, 1992, Mary Goebel, Wallowa County District Attorney, filed a motion to disqualify Judge Schenck in the *Vaughn* cases.

32. On June 16, 1992, following a hearing in an unrelated matter, Judge Schenck asked to talk to Ms. Goebel. Ms. Goebel agreed to talk with Judge Schenck later that day. At approximately 2:00 p.m. Judge Schenck encountered Ms. Goebel outside the Courthouse. The two of them went to Ms. Goebel's office. Judge Schenck closed the door and said that he wanted to talk to Ms. Goebel about disqualifying him from the *Larry Vaughn* case.

33. Judge Schenck initiated the communication with Mary Goebel.

34. Although the communication referred to other general matter, it was prompted by Ms. Goebel's motion to disqualify

Judge Schenck in the *Vaughn* matter. Judge Schenck specifically referred to the disqualification and the merit of the disqualification was discussed.

35. On July 9, 1992, the Supreme Court issued its decision in *State ex rel Karen Hopkins v. Ronald D. Schenck,* Oregon Supreme Court No. 38693.

36. In a letter dated July 9, 1992 and received by the Supreme Court on July 24, 1992, Judge Schenck wrote to Justice Susan Graber regarding the opinion and stating the Judge's disagreement with certain aspects of the opinion. At the time he wrote the letter, Judge Schenck did not intend to ask for reconsideration of the decision.

37. On July 9 and July 24, 1992, the *Hopkins* case was a pending case in the Oregon Supreme Court.

38. On September 14, 1992 and again on September 16, 1992, William Dodson wrote to the Union County Circuit Court asking for a court hearing.

39. On September 16, 1992, Mr. Dodson was brought to Judge Schenck's court.

40. Judge Schenck reviewed the court file and the letters to the Court from Mr. Dodson. One of the letters specifically referred to Mr. Dodson's attorney, Wade Bettis.

41. Defendant's counsel, Wade Bettis, was not present.

42. At the hearing, Judge Schenck knew that attorney Wade Bettis represented the defendant. (Exhibit 203).

Applicable Law

The Commission evaluates these facts against the Oregon Code of Judicial Conduct, Canons 1, 2A and 3A(4).

Conclusion

Applying the requirements of the Code of Judicial Conduct to the facts set forth above, the Commission concludes that there is clear and convincing evidence that Judge Schenck willfully violated the Code of Judicial Conduct in *State v. Lawrence Vaughn* and *State ex rel Karen Hopkins v. Ronald D. Schenck.* There is not clear and convincing evidence that Judge Schenck violated the Code in *State v. William Dodson.*

The Code is clear: a Judge may neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. As in so many of the matters brought to the Commission's attention, Judge Schenck seems to lack the common sense about what is and is not permissible conduct under the Code of Judicial Conduct.

In the *Vaughn* case, Judge Schenck clearly initiated the communication with Mary Goebel. As to whether *Vaughn* was the subject of the communication, there is a conflict in the testimony. Mary Goebel recalls that the communication focused on *Vaughn,* at least at the beginning of the conversation. Judge Schenck recalls that the conversation was more generally about disqualifications. In judging the credibility of these two witnesses, the Commission was influenced by the demeanor of the witnesses and the consistency of Ms. Goebel's testimony with her prior written statement. Much of Judge Schenck's testimony in this proceeding, by contrast, was different in tone and substance from what he wrote. On this point, the Commission finds Ms. Goebel's testimony to be more credible. Ms. Goebel had recently filed a motion to disqualify in the *Vaughn* case. That motion prompted Judge Schenck to ask for the meeting and the *Vaughn* case was specifically discussed.

In *Hopkins,* the Judge, at the time he wrote the letter to Justice Graber, was a party, not the decision makers. The mandamus proceeding, for all practical purposes, was over. Nevertheless, the prohibition of Canon 3A(4) extends to all cases, not just those

pending before the judge. Even technical violations are to be discouraged.

The *Dodson* case presents a situation where the Judge knew from defendant's letters to the Judge that the defendant was represented by Mr. Bettis, but conducted the proceeding without Mr. Bettis' presence. The Code requires either the party or the party's attorney to be accorded a full right to be heard according to law and prohibits communications with a party outside of the record. Judge Schenck communicated with the defendant on the record in a hearing requested by the defendant. The defendant may have legal right to have an attorney present. There is no evidence, however, that the defendant did not get a full and fair hearing before Judge Schenck on his motion to change attorneys. Judge Schenck did not violate the Code by conducting the proceeding as he did.

E. Findings and Conclusions of Law: Acting After Disqualification (Complaint Paragraph 9).

Findings

43. On January 8, 1991, Judge Schenck signed an order disqualifying himself *In the Matter of Elizabeth Hickman,* Union County Court Case No. 90-05-2905.

44. On June 29, 1992, Judge Schenck signed an order allowing resignation of attorney.

45. At the time Judge Schenck signed the order, there were considerable deficiencies in the court filing system, and it was common for motions to be presented to judges without the entire file being before them or the judges knowing of prior disqualifications in the case.

Applicable Law

The Commission evaluates these facts against the Oregon Code of Judicial Conduct, Canons 1 and 2A.

Conclusion

Applying the requirements of the Code of Judicial Conduct to the facts set forth above, the Commission concludes that there is not clear and convincing evidence that Judge Schenck willfully violated the Code of Judicial Conduct.

F. Findings and Conclusions of Law: Public Statements Regarding the District Attorney (Complaint Paragraph 10).

Findings

46. Findings 30 to 34 are incorporated herein by reference.

47. On September 17, 1992, the *Wallowa County Chieftain* published a letter signed by Judge Schenck. The letter discussed Judge Schenck's position on release conditions in sex abuse cases. The letter includes this statement:

> "The conditions I set in the *Vaughn* case were tough and reasonable. All Ms. Grote[1] had to say was she demanded even tougher conditions and placed the blame on me. Unfortunately, her immaturity led her to view herself as the knight on the white charger and to set herself up as all-knowing and righteous in her own position. Therefore, I am the devil to be avoided at all costs.
>
> If Ms. Grote maintains her position, the county will not have the services of the Circuit Judge elected by the voters of this county to hear felony criminal cases. Instead, Eric Valentine or a visiting judge will handle the Circuit Court criminal jurisdiction and the county will be served by a district attorney who has demonstrated a total lack of present ability, experience and maturity to handle the job of district attorney." (Exhibit 265).

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[1] We assume that Ms. Grote and Ms. Goebel are the same individual.

48. On October 1, 1992, the *Wallowa County Chieftain* published a lengthy "guest editorial" by Judge Schenck. The editorial is a sharply worded personal attack on the professional conduct of district attorney Mary Goebel. (Exhibit 266).

Applicable Law

The Commission evaluates these facts against the Oregon Code of Judicial Conduct, Canons 1, 2A and 3A(6).

Conclusion

Applying the requirements of the Code to the facts set forth above, the Commission concludes that there is clear and convincing evidence that Judge Schenck willfully violated the Code of Judicial Conduct in his public statements contained in the newspaper letter and the guest editorial.

The evidence and testimony received by the Commission in three days of testimony indicated that Judge Schenck was frequently turf conscious and certainly lacked common sense in many instances. His two letters to the *Wallowa County Chieftain,* however, exhibited a different side of Judge Schenck: a maliciousness towards Mary Goebel which was remarkable in its intensity and in the public way in which he chose to display it.

Canon 3A(6) generally prohibits public comment about pending or impending proceedings in any court, except public statements in the course of official duties or to explain the procedures of the court. Canon 4 permits a judge to write concerning the law, the legal system and the administration of justice, provided that doing so does not cast doubt on his capacity to be impartial. The Commission is unable to see how the two letter fit within the requirements of the Code. We note that even Professor Lubet, whose analysis of Judge Schenck's conduct stretched the outer limits of what the Code permits, did not render an opinion defending the Judge's conduct.

The core purpose of the Code, as set forth in Canons 1 and 2, is to protect public confidence in the integrity and impartiality of the judiciary and the administration of justice, Judge Schenck's slashing attack on Ms. Goebel hardly serves to accomplish that purpose. To the contrary, the articles could only diminish public confidence. For example, Judge Schenck essentially says that he must be both prosecutor and Judge.

> "The real problem I face with Ms. Goebel representing the State is how do I ensure that the State gets a fair trial? How do I ensure that the people of Wallowa County have their case against the criminal defendant properly and competently presented — when it is obvious that the people's prosecutor often does not have a clue as to how to proceed?"

The impression left by Judge Schenck's statements is that he would have to perform the prosecutor's role and would be biased in favor of the State in order to make up for the alleged incompetence of the district attorney.

In response to a series of questions by Commissioner Petersen (Transcript, pp. 780, *et seq.*), Judge Schenck was unable to explain how his statements contributed to the administration of justice in Wallowa County, except to say that the public had a right to know about the performance of the district attorney. The public does have a right to know, but it is not the Judge's job to tell them through a vindictive and highly personal, subjective written evaluation. In that context, the Commission notes that if such a statement had been published when Ms. Goebel was a candidate for re-election, it would violate Canon 7's prohibition on political activities involving non-judicial public office.

Judge Schenck's lawyers suggest that the Commission seeks to impose an outright ban on judges criticizing the administration of justice in their jurisdictions. In support of that proposition, they cite *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990). The *Flowers* case is easily distinguishable. In *Flowers*, the judge

wrote a letter about the general conduct of the district attorney's office and the local courts. The letter stated a general professional disagreement with the handling of certain cases. Judge Schenck's communications, by contrast, contain more than a mild professional disagreement. The articles are an aggressive personal attack on the district attorney on such non-judicial matters as crying when criticized and on her salary. Finally, it is well established that the State has a profound interest in protecting the integrity of the judicial system, which interest justifies some limitation on First Amendment rights. *In Re Fadeley,* 310 OR 548, 802 P.2d 31 (1990).

Though the Commission views the impact on the public's view of our judicial system as the most serious consequence of these articles, they also constitute a prohibited comment on pending case. The *Vaughn* case is specifically mentioned in the letter published on September 17, 1992. The letter published October 1, 1992 also refers to eight felony cases filed in 1991 in Wallowa County by Ms. Goebel.

G. Findings and Conclusions of Law: Denying Full Right to Be Heard (Complaint Paragraph 11).

Findings

49. On March 2, 1992, Judge Schenck presided at a hearing on a motion to dismiss in *State v. Frederick William Devore,* Union County Case Nos. 91-12-34599 and 34597. The issue at the hearing was whether a recently amended statute of limitations was constitutional.

50. Following the hearing, the district attorney, pursuant to the Court's direction at the conclusion of the hearing, submitted a proposed order finding the statute constitutional.

51. On or about March 4, 1992, Judge Schenck amended the proposed order by interlineation. The revised order stated that the new statute of limitations was unconstitutional.

52. The district attorney did not receive the amended order. The reasons the district attorney did not receive the order are not clear.

53. On April 24, 1992, Judge Schenck presided over a sentencing hearing in the case of *State of Oregon v. David James O'Quinn,* Union County Circuit Court No. 92-01-34619.

54. Following the hearing, the deputy district attorney submitted a sentencing order. The sentencing order did not, in Judge Schenck's opinion, accurately reflect his ruling. Therefore, he amended the sentencing order. The amendment added additional findings. The parties were not give a right to be heard on the findings added by the revision.

Applicable Law

The Commission evaluates these facts against the Oregon Code of Judicial Conduct Canons 1, 2A and 3A(4).

Conclusion

Applying the requirements of the Code of Judicial Conduct to the facts set forth above, the Commission concludes that there is not clear and convincing evidence that Judge Schenck willfully violated the Code of Judicial Conduct in the *Devore* and *O'Quinn* cases.

Judge Schenck's conduct in these cases is another example of sloppy work. However, there is not sufficient evidence in the record to indicate that Judge Schenck intended to deny the parties and their attorneys an opportunity to be heard on these matters. It would have been prudent and courteous to simply pick up the phone and contact attorneys in a conference call regarding the proposed amendments. His failure to do so may reflect poorly upon his performance, but is not a violation of the Code.

IV.

RECOMMENDATION

As set forth above, Judge Schenck's conduct repeatedly fell short of the governing standards of judicial conduct. In determining an appropriate sanction in judicial discipline cases, the Commission evaluates several criteria, including: the impact upon litigants and attorneys of the judge's conduct; the extent to which the conduct tends to undermine public confidence in the judicial system; the seriousness of the violations; and the extent to which the judge demonstrates an interest in avoiding similar problems in the future. After considering these criteria in light of the testimony and evidence received by the Commission, the Commission unanimously recommends that Judge Schenck be suspended without pay for a period of three months.

Judge Schenck's transgressions varied in their seriousness. His ex parte contacts were careless, but not particularly damaging to litigants, lawyers or the public. On the other hand, his failure to recuse himself in cases where his impartiality might reasonably be questioned created an enormous burden for the lawyers and their clients in those cases. Equally serious is Judge Schenck's published attack on a public official and an officer of the court. These letters practically guarantee that Judge Schenck will never be able to sit on a criminal matter in Wallowa County while District Attorney Mary Goebel is in office. Judge Schenck resisted granting motion to disqualify, while at the same time engaging in public actions which reinforced the district attorney's need to ask for his disqualification. It is difficult for this Commission to imagine any action which could be more counterproductive to the administration of justice. Such a situation has a huge impact on the allocation of judicial resources in that district and a ripple effect in other judicial districts.

This Commission and the Oregon Supreme Court have said many times that judges are held to an extraordinarily high

standard of conduct — higher than for any other class of public officials and higher than the standards applied to lawyers. A judge's personal and professional conduct must be above reproach. At times judges must limit the public expression of their feelings and set aside their pride in favor of ensuring the reality and appearance of impartiality. Though universally important, adherence to standards of judicial conduct is particularly important in rural communities where the judges hold visible positions of trust and authority. Consequently, court decisions, such as Judge Schenck's decisions on disqualification, and public conduct, such as the publication of the letters in the *Wallowa County Chieftain,* directly impact the public perception of the judicial system.

During the course of Judge Schenck's testimony, it became clear the Judge believes that, in every instance cited in the Commission Complaint, his conduct was consistent with these high standards. There was, therefore, no acknowledgment on his part that he would learn anything from the proceeding or be more attentive to his obligations under the Code in the future. To use a slightly overworked phrase of the day, in the Commission's opinion, Judge Schenck "just does not get it".

The Commission believes that a three-month suspension without pay is an appropriate sanction give the injury to clients and lawyers and the damage done to the public perception of the judicial system in District 10. The Commission has no illusions that this sanction will compel greater attention by Judge Schenck to the requirements of the governing standard of conduct. However, Judge Schenck and his constituents in Wallowa and Union Counties could be well served if the Judge takes time during his period of suspension not just to reflect upon his conduct, but to actively pursue educating himself regarding the Oregon Code of Judicial Conduct.

Respectfully submitted,

COMMISSION ON JUDICIAL
FITNESS AND DISABILITY

/s/ Richard M. Page
Richard M. Page, Chair

Richard T. Kropp
Barbara Haslinger
Charles Davis
Agnes M. Petersen
Jon B. Lund
Linda L. Bergman

April 29, 1993

CONCURRING OPINION

I concur with the majority. I am convinced that gender bias is involved in this case. The male members of the Bar that were blanket disqualifying "him" seldom were challenged on the basis of "bad faith" when the affidavit was timely filed. A female member of the Bar who filed a single disqualification affidavit was challenged. Further, the Judge made remarks in the newspaper such as "Ms. Goebel is a lovely young lady" and referred to her "crying" when criticized. In his conversation with Ms. Goebel on June 16, 1992, the Judge told her she was "like one of my daughters" and "just a hometown girl". During his testimony, Judge Schenck stated that he "did not speak the same language as Ms. Goebel". There were no habits the males had that the Judge criticized.

Because conduct amounting to gender bias was not charged in the Complaint, my decision in this case was not based upon it.

Nevertheless, it is my opinion that Judge Schenck has an attitude about women in the work place which is inconsistent with his responsibilities as a judge and as a judicial administrator. Perhaps Judge Schenck will take this opportunity to educate himself on the importance of treating all persons equally and learn to speak the same language as the young, and often female, members of the Bar.

Agnes M. Petersen

CONCURRING AND DISSENTING OPINION

In its recommendation, the majority of the Commission states, "The Commission has no illusions that this sanction will compel greater attention by Judge Schenck to the requirements of the governing standard of conduct." I agree. But, the majority has chosen the wrong sanction. Where, as here, a violation is likely to recur, the appropriate sanction is removal from office. I recommend removal.

Charles Davis

Wallowa County Chieftain
Letter to the Editor
Thursday, September 17, 1992

Judge Ron Schenck explains, defends position

I was more than a little disturbed by the article entitled 'Schenck disqualified from abuse case.'

The reporting of the disqualification was fine. The disturbing part was linking the reason for the disqualification with the Lewis case in Union County and completely misrepresenting the facts of the Lewis case and my actions in it.

This linking and misrepresentation gave the impression that I am in some way sympathetic to child molesters. Anyone who knows me even slightly, knows that is a completely and totally false impression.

For the past decade there has been more than a little hysteria connected with the handling by law enforcement and the courts of allegations of child sexual abuse.

I will not run a court that is driven by hysteria or political pressure of any kind in any type of case.

The use and abuse of a child in any manner for adult sexual gratification is abominable. Child sexual abuse or even just physical abuse almost universally raises in normal people strong passions and demands for severe consequence to the perpetrator.

In most of the cases, the perpetrator admits or there is strong evidence and guilt is fairly easily established.

However, there are those cases where allegations are made and for varying reasons, nothing is very clear.

Sometimes it is a proof problem where there are no eyewitnesses except the child victim and the perpetrator, and very little or no physical evidence — or the physical evidence is not clearly

tied to the abuse — could be caused by some other trauma, physical or mental, etc.

Sometimes the motive of the person reporting is challenged, such as in child custody cases where one parent accuses the other, or where teenagers have a history of discipline problems with the parent and the child is accusing the parent.

There are also problems of time passing between the alleged abuse and the reporting, especially where very young children are the victims. Quite often they do not report until later in life. This raises memory and perception problems.

The methods and procedures used by those investigating the allegations are critical in cases where the child victim's testimony is critical — especially a very young child.

The investigative interview must be conducted without any hint of leading or suggestive questions or information being fed the child. Law enforcement and child protective personnel have, over the last decade, made significant strides in this area but more is being learned every day.

Children, like adults, sometimes misperceive and some are suggestible.

Once an allegation of child sex abuse is made, the consequences are devastating and irretrievable. Adults are destroyed; children are destroyed; whole families are destroyed.

Where there are significant problems with a child sex abuse case, it becomes a prosecutor's worst nightmare. If they prosecute and lose, they have not only not brought a perpetrator to justice and thereby accomplish some measure of protection of the victim and the public, but they have further traumatized the victim and the victim's family and possibly destroyed the life of the alleged perpetrator.

If they do not prosecute, they stand to be vilified by the persons bringing the charge and by the media.

Courts do not have as difficult a job as prosecutors in those cases, but there is almost unanimous agreement amongst judges across the nation that contested child sex abuse cases are the most difficult cases which courts are called upon to handle — especially the pre-trial proceedings and sentencing. Usually a jury takes the burden of deciding guilty or not guilty.

The court is faced with the first difficult decision when release pending trial is an issue.

The law is clear that a defendant has the right to release pending trial (except in cases of murder where there is clear and convincing reason to believe the defendant is guilty) upon posting reasonable bail or on the defendant's own recognizance if there is no reason to believe that the defendant will fail to appear and answer to the charges.

The court may, on a bail release or an O.R. release, set reasonable conditions to assure the defendant's appearance.

The court cannot set conditions that are in fact, or in effect, punishment for the alleged crime. All defendants are under our constitution, presumed innocent until proven guilty.

If there are facts that lead the court to believe that the defendant presents a danger to the public or the victims, etc., the court can set conditions on the activities of the defendant pending trial.

In Oregon, the leading case is *Sexson v. Merten*, 291 Or 441, which held that a defendant accused of DUII who had a clear alcohol addiction problem and a record of convictions for alcohol related offenses could be required, pending trial, to abstain from the use of alcohol and be required to report to a custody officer, etc.

So, in child sex abuse cases where there is a factual background to indicate that the defendant is a danger to his alleged

victims or to other potential victims, the court can require that the defendant not contact directly or indirectly the victim or the victim's family or place himself in circumstances where the defendant might have opportunity to victimize other children.

This usually means that the defendant will be required to have some neutral, responsible adult around if children are present.

The conditions of release must be reasonable and based on facts. In most cases, other than child sex abuse cases, conditions are pretty standard and easily set. But in child sex abuse cases, the old paranoia and hysteria still enters. If the court tries to be reasonable and base a release decision on the facts of the particular case, accusations of being soft on child sex abusers are raised. Statistics are cited as to the probability that child sex abusers will re-offend; that abusers of females often also abuse males, etc., etc.

The problem is that the court is not dealing with a statistic, but with a human being who is entitled to the protection of the constitution and the law until proven guilty.

At this early stage, the court really knows very little about the evidence against the defendant.

The prosecutors want to absolve themselves of any blame if the defendant re-offends pending trial, so they often demand conditions they know are not proper, or at least are stretching the boundaries of the law. The prosecutor also has the benefit of being aware of all of the evidence.

The principle [*sic*] condition demanded is that the defendant not have a contact with children under age 18.

This includes attending church where children are present, going to school functions, or entering McDonalds, etc.

Applied to every case I do not believe this to be a proper condition, and it is almost impossible to administer.

Conditions are also demanded to prevent an accused parent from having any contact with one or more of their own children

who they are not accused of abusing and who are not witnesses. This automatically totally splits up families — sometimes for years — before there is a trial.

These are difficult problems, not [*sic*] be avoided by a Pavlov's dog type response to every case — which is what some judges do to avoid making tough decisions and to avoid criticism. There should be no such thing as standard release conditions or release conditions based on a standard 'policy' in these cases.

All standard release conditions are established for is to protect the prosecutor and the judge from criticism. However, the prosecutor can always point at the judge and that is how it should be. The judge makes the decision and the buck stops with the judge.

The conditions I set in the Vaughan case were tough and reasonable. All Ms. Grote [*sic*] had to was say [*sic*] she demanded even tougher conditions and place the blame on me. Unfortunately her immaturity led her to view herself as the knight on the white charger and to set herself up as all knowing and righteous in her own position. Therefore, I am the devil to be avoided at all costs.

If Ms. Grote [*sic*] maintains her position, the county will not have the services of the Circuit Judge elected by the voters of this county to hear felony criminal cases. Instead, Eric Valentine or a visiting judge will handle the Circuit Court criminal jurisdiction and the county will be served by a district attorney who had demonstrated a total lack of present ability, experience and maturity to handle the job of the District Attorney. I will expand on the latter with specifics in another report.

R. D. Schenck
Circuit Judge
District 10

Wallowa County Chieftain
Guest editorial
Thursday, October 1, 1992

A judge's evaluation of the district attorney

By Ronald D. Schenck

This is a report on my observations and evaluation of the performance of Mary Goebel as District Attorney for Wallowa County.

This is not something I would do in the ordinary course. However, Ms. Goebel's recent decision to disqualify me in every case she files leaves me with no alternative.

In my letter to you regarding the disqualification issue dated August 31, 1992, I stated that I would set forth specifics upon which I based my opinion that Ms. Goebel does not have the capability, experience or maturity to handle the duties of District Attorney. I do that now.

Since we both took office at the same time, I have worked with Ms. Goebel during the entire period of her performance in office.

She had not won one felony jury trial.

She still does not have a grasp of how to present a witness.

She does not as yet have the ability to differentiate between what evidence should be presented in the State's case in chief as opposed to rebuttal.

She does not understand the purpose of expert testimony in sex abuse cases or how to lay the proper foundation to get it admitted.

In one sex abuse case, she had to dismiss the case three times and take the indictment back to the grand jury the fourth time before she got it right. That case has been delayed for trial for

over a year because she simply did not know how to get it prepared for trial.

She dismissed a felony sex abuse case based on an experienced defense attorney's assertion that the statute of limitation had ran [*sic*] out when in fact it had not.

The District Attorney always prepares the Sentence Order and Judgment. I have had to revise every sentence order she has presented to me. Some were seriously defective.

In two major felony cases, I have had to reject plea bargains which she agreed to. In both cases, she would have permitted the defendant to be sentenced to optional probation for serious felony crimes — one for dealing in controlled substances and having 90 pounds of marijuana in possession, and another for assault on his wife which almost killed her. I ended up sentencing both to maximum terms in state prison.

In the first nine months or so she was consistently late to court. I finally had to reprimand her in open court.

If you speak to her critically, even in a positive vein, she cries.

She has no comprehension of what a case (work) load is. She spoke to me about applying to the County for inclusion in her budget of money to hire a deputy to help her.

The fact of the matter is that she has a workload (caseload) which is not more than 20 percent and probably closer to 10 percent of the caseload carried by the attorneys in the District Attorney's office in La Grande. There are three attorneys in La Grande, and over 200 felony cases were filed in 1991. Ms. Goebel filed eight felony cases in Wallowa County in 1991. The same percentages would hold for District Court.

Ms. Goebel, straight out of law school is being paid around $50,000 per year with benefits above that of $10,000 per year.

She should be able to do the county's civil work for nothing and still have less than a 50 percent workload. She resigned from doing the civil work even though she was getting paid.

She accuses me of being biased against the State. The problem is really the opposite for me as judge. The real problem I face with Ms. Goebel representing the State is how do I insure [*sic*] that the State gets a fair trial? How do I insure [*sic*] that the people of Wallowa County have their case against the criminal defendant properly and competently presented — when it is obvious that the people's prosecutor often does not have a clue as to how to proceed?

The judge's hands are tied for the most part. The judge must maintain impartiality, especially in criminal trials and cannot help either side present their case.

I could go on, but I think you have the picture by now.

Putting an attorney right out of law school into the courtroom trying felony jury cases is like putting a medical student fresh out of medical school into the operating room to do complex surgery.

Unfortunately, Ms. Goebel is the sole attorney in the Wallowa County District Attorney's office. She had no one to guide her on a daily basis. Her case load is not sufficient for her to gain experience rapidly.

I spent several years going to court with an experienced attorney, as his assistant, before I tried a case.

Ms. Goebel is a lovely young lady. But she has placed herself in a position for which she has neither the training or experience to perform the duties competently.

Unfortunately, in this instance, it is the public that will get the short end of the stick. It may also be that Ms. Goebel will be seriously damaged in her career. She has a lot of potential if she was in a position where she could be properly trained.

The position of the District Attorney in Wallowa County has had its problems for as long as I can remember. No energetic, experienced, young career-minded attorney wants to take the job because it really offers little challenge and little opportunity for advancement. So the county has been saddled with older attorneys who were in fact not all that energetic or younger attorneys who were not all that experienced.

Perhaps the county court needs to investigate what alternatives might be available to ensure the county has a vigorous, competent prosecutor.

Editor's note: Ronald D. Schenck is the Circuit Court judge for Union and Wallowa counties.

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF OREGON

SC S40197

In re Complaint as to the Conduct of

THE HONORABLE RONALD D. SCHENCK

Accused.

ORDER DENYING PETITION FOR RECONSIDERATION

Before Gillette, Van Hoomissen and Unis, Justices, and Richardson and Warren, Justices, *pro tempore*.

The Honorable Ronald D. Schenck has petitioned for reconsideration of the court's decision of March 10, 1994. The petition is denied.

DATED this 28th day of April, 1993. [*sic* — should be 1994]

/s/ George Van Hoomissen
GEORGE VAN HOOMISSEN
Presiding Justice

c: Hon. Ronald D. Schenck
Ronald L. Marceau
David C. Knowles

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